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1512

United States

1506

# Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

KOKUSAI KISEN KABUSHIKI KAISHA, a Corporation,  
Claimant of the Japanese Steamer "BOSTON MARU,"  
Her Engines, etc.,

Appellee.

and

UNITED STATES OF AMERICA, as Owner of the AMERI-  
CAN STEAMSHIP "WEST KEATS," *in Personam*,

Appellant,

vs.

KOKUSAI KISEN KABUSHIKI KAISHA, a Corporation,  
Claimant of the Japanese Steamer "BOSTON MARU,"  
Her Engines, etc.,

Appellee.

## Apostles on Appeals.

Upon Appeals from the United States District Court  
for the District of Oregon.

FILED

APR 13 1927

F. D. MORCKTON,  
CLERK.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant.

vs.

KOKUSAI KISEN KABUSHIKI KAISHA, a Corporation,  
Claimant of the Japanese Steamer "BOSTON MARU,"  
Her Engines, etc.,

Appellee.

and

UNITED STATES OF AMERICA, as Owner of the AMERI-  
CAN STEAMSHIP "WEST KEATS," *in Personam*,

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Apostles on Appeals.

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Upon Appeals from the United States District Court  
for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

Mr. GEORGE NEUNER, United States Attorney,  
Old Post Office Building, Portland, Oregon, and  
MacCORMAC SNOW, Platt Building, Port-  
land, Oregon,

For the Appellant.

Mr. WALLACE McCAMANT, Mr. W. LAIR  
THOMPSON, and Mr. RALPH H. KING,  
Northwestern Bank Building, Portland, Ore-  
gon,

For the Appellee.

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In the District Court of the United States for the  
District of Oregon.

A.-9490.

UNITED STATES OF AMERICA,

Libelant,

vs.

Japanese Steamship "BOSTON MARU," Her  
Engines, Boilers, Tackle, Apparel, Furni-  
ture, etc.,

Respondent.

A.-9492.

KOKUSAI KISEN KABUSHIKI KAISHA, a  
Corporation, as Owner of the Japanese  
Steamship "BOSTON MARU,"  
Libelant,

vs.

UNITED STATES OF AMERICA, as Owner of  
the American Steamship "WEST KEATS,"  
Respondent.

## CAPTION.

BE IT REMEMBERED that on the eighth day of November, 1924, there was filed in the above-entitled court a libel by the United States of America, as libelant, against the Japanese steamer "Boston Maru," her engines, boilers, tackle, apparel, furniture, etc., said cause being numbered in said court. A.-9490; that on said date a warrant of arrest was duly issued, and said vessel was arrested by the United States Marshal of the District of Oregon; on November 10, 1924, Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the Japanese steamship "Boston Maru," filed a claim for the said "Boston Maru" as owner thereof and gave stipulation to abide by and pay the decree, with the Fidelity and Deposit Company of Maryland, as surety thereon, which bond was duly approved by the Judge of said court on November 10, 1924, and the said ship released to the said claimant; that on November 8, 1924, there was duly filed in said court a libel, in which the Kokusai Kisen Kabushiki Kaisha, a cor-

poration, as owner of the Japanese steamship "Boston Maru," was libelant against the United States of America as owner of the American steamship "West Keats," said cause being numbered in said court, A.-9492; that on said date said libelant filed a stipulation for costs in the sum of \$250.00 with the Fidelity and Deposit Company of Maryland, as surety thereon; thereafter on [1\*] November 17, 1924, there was filed in each of the above causes, a stipulation signed by the proctors for the respective parties by which it was agreed that said causes may be consolidated "for the purpose of taking depositions and testimony and for trial under the more convenient title 'Steamship Boston Maru'"; thereafter on December 8, 1924, the claimant of the said "Boston Maru" filed its answer to the libel of the United States; thereafter on December 10, 1924, the United States, as owner of the "West Keats," filed its answer to the libel of the Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the Japanese steamship "Boston Maru"; on December 12, 1925, the libelant, the United States, filed in said cause its motion for an order requiring the claimant of the "Boston Maru" to file its bill of particulars, for an order consolidating said causes, and for leave to amend its libel herein, and on said date filed herein a bill of particulars of its damages; thereafter on February 6, 1926, an order was duly entered in said cause by the Honorable Charles E. Wolverton, Judge, in accordance with the foregoing motion requiring the said claimant of the "Bos-

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\*Page-number appearing at the foot of page of original certified Apostles on Appeal.



ton Maru" to file a bill of particulars of its alleged damages, to consolidate said causes for the purpose of taking depositions and testimony and for trial, under the more convenient title "Boston Maru," and permitting the libelant, the United States, to amend its libel herein; thereafter on July 6, 1926, by leave of the Court, the libelant, Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the steamship "Boston Maru" filed in said cause an amended libel; thereafter on August 7, 1926, there was filed in the consolidated cause a stipulation settling the amount of damages suffered respectively by the "Boston Maru" and by the "West Keats" in the collision alleged in the libels; that on February 10, 1926, the United States filed its answer to the amended libel filed by the Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the Japanese steamship "Boston Maru"; thereafter on October 6, 1926, the said consolidated causes came on for final hearing before the Court upon the pleadings and the proofs before the Honorable Robert S. Bean, District Judge, and upon said hearing testimony of witnesses was taken in open court and there was also read in evidence depositions of witnesses theretofore taken pursuant to stipulations of the parties; the trial [2] of said cause was continued on October 27, 1926, October 28, 1926, and was then continued until November 2, 1926, and upon said date, said cause was submitted to the Court; thereafter on November 22, 1926, there was entered in said cause a final decree of the Court, dismissing the libel filed by the United States

against "Boston Maru," and awarding damages to the Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the Japanese steamship "Boston Maru," in the sum of \$15,788.91, with interest thereon at the rate of four per cent per annum, from October 26, 1924, and its costs and disbursements in this cause, taxed at \$212.60; thereafter on November 24, 1926, the United States, libellant, filed in said cause a petition for rehearing, and on December 6, 1926, said petition was denied by the Court; thereafter on February 17, 1927, the said United States filed in each of said causes its separate notice of said petition for appeal; its separate assignments of error, and on said date there was duly entered in said court separate orders allowing the said appeal; also there was filed separate citations on appeal; on said February 17, 1927, there was filed in said cause a petition of the United States for further consolidation of said causes for all purposes connected with said appeals, and an order was duly entered thereon consolidating said causes; thereafter on February 18, 1927, there was filed in said consolidated cause a stipulation with the order of the Court endorsed thereon to transmit to the Court of Appeals all of the exhibits in said cause; on February 18, 1927, there was duly filed in said cause a præcipe designating the portions of the record which the appellant desired to have incorporated in the apostles of appeal.

Portland, Oregon, March 10, 1927.

G. H. MARSH,  
Clerk. [3]

In the District Court of the United States for the  
District of Oregon.

No. A.-9490.

UNITED STATES OF AMERICA,

Libelant,

vs.

The Japanese Steamer "BOSTON MARU," Her  
Engines, Boilers, Tackle, Apparel, Furni-  
ture, etc.,

Respondent,

KOKUSAI KISEN KABUSHIKI KAISHA,

Claimant.

#### CITATION ON APPEAL.

United States of America,—ss.

To Kokusai Kisen Kabushiki Kaisha, a Japanese  
Corporation, and to the Agents, Attorneys and  
Stipulators Thereof, GREETING:

You are hereby cited and admonished to be and  
appear in the United States Circuit Court of Ap-  
peals for the Ninth Circuit to be held at the city  
of San Francisco, in the State of California, thirty  
(30) days from and after the date of this citation,  
pursuant to order made and entered in this court  
and cause of the same date as this citation upon  
the application of the libelant herein and appellant  
in this appeal, then and there to show cause if any  
there be why that final judgment and decree entered  
in said cause November 22, 1926, against said libel-  
ant and in favor of said Japanese corporation

should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable ROBERT S. BEAN, Judge of the above-entitled court, this 17th day of February, 1927.

R. S. BEAN,  
Judge. [4]

Due and sufficient service by copy of the foregoing citation is acknowledged this 17th day of February, 1927.

McCAMANT & THOMPSON,  
Proctors for "Boston Maru."

[Endorsed]: Filed Feb. 17, 1927. [5]

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In the District Court of the United States for the  
District of Oregon.

No. A.-9492—IN ADMIRALTY.

The "BOSTON MARU."

KOKUSAI KISEN KABUSHIKI KAISHA, a  
Corporation, as Owner of the Japanese  
Steamship "BOSTON MARU,"

Libelant,

vs.

UNITED STATES OF AMERICA, as Owner of  
the American Steamship "WEST KEATS,"  
*in Personam,*

Respondent.

## CITATION ON APPEAL.

United States of America,—ss.

To Kokusai Kisen Kabushiki Kaisha, a Japanese Corporation, and to the Agents, Attorneys and Stipulators Thereof, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, thirty (30) days from and after the date of this citation, pursuant to order made and entered in this court and cause of the same date as this citation upon the application of the respondent herein and appellant in this appeal, then and there to show cause if any there be why that final judgment and decree entered in said cause November 22, 1926, against said respondent and in favor of said Japanese corporation should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable ROBERT S. BEAN, Judge of the above-entitled court, this 17th day of February, 1927.

R. S. BEAN,  
Judge. [6]

Due and sufficient service by copy of the foregoing citation is acknowledged this 17th day of February, 1927.

McCAMANT & THOMPSON,  
Proctors for "Boston Maru."

[Endorsed]: Filed Feb. 17, 1927. [7]



In the District Court of the United States for the  
District of Oregon.

November Term, 1924.

BE IT REMEMBERED, that on the 8th day of  
November, 1924, there was duly filed in the District  
Court of the United States for the District of Ore-  
gon, a libel in cause numbered A.-9490, The United  
States of America, Libelant, vs. The Japanese  
Steamer "Boston Maru," in words and figures as  
follows, to wit: [8]

In the District Court of the United States for the  
District of Oregon.

UNITED STATES OF AMERICA,

Libelant,

vs.

Japanese Steamer "BOSTON MARU," Her En-  
gines, Boilers, Tackle, Apparel, Furniture,  
etc.,

Respondent.

LIBEL—No. A.-9490.

The libel of the United States of America against  
the Japanese steamer "Boston Maru," her engines,  
boilers, tackle, apparel, furniture, etc., alleges as  
follows:

I.

During the times herein named libelant was and  
now is the owner of a certain steel cargo carrying  
steamship known as the "West Keats" and being

of approximately 8,538 dead-weight tons and 410 feet long. During said times said "West Keats" was and is employed as a merchant vessel and operated on behalf of the United States by the United States Shipping Board, acting through the United States Shipping Board Emergency Fleet Corporation, a corporation organized under the laws of the United States, acting through the Columbia Pacific Shipping Company, an Oregon corporation.

## II.

The Japanese steamer "Boston Maru" herein proceeded against is now at the city of Portland and within the District of Oregon. Said steam vessel is 400 feet long.

## III.

At about 44 minutes after one o'clock on the morning of Sunday, October 26, 1924, a collision occurred between the said "Boston Maru" and the said "West Keats" on the waters of the Columbia [9] River at a point opposite and near Columbia City, Oregon, by reason of which collision libelant was damaged as hereinafter alleged.

## IV.

The circumstances of said collision were as follows: During the evening of Saturday, October 25, 1924, at a time not exactly known to libelant, the said "Boston Maru" anchored in the Columbia River off Columbia City, Oregon, with about 30 fathoms of anchor chain out. The spot at which the anchor of said "Boston Maru" was dropped is not exactly known to libelant, but on information and belief libelant alleges that said anchor was

dropped a little below that certain fixed white light at or near Columbia City which forms the rear light of the St. Helens Bar Range and about 600 feet or 700 feet from the Oregon bank of said river. At and about said point the portion of the Columbia River deep enough for the anchorage and navigation of vessels of the type of the said "West Keats" and the said "Boston Maru" extends out from the Oregon bank for a distance of nearly 2,000 feet but the fairway and customary channel in use by such vessels passing up and down said river, and especially at night, is along the Oregon bank and at a distance just far enough therefrom to afford safety in navigation, or approximately 400 feet from said Oregon bank. It is customary to anchor vessels at or a short distance below the portion of said river opposite said rear range light but the customary anchorage grounds at said point are considerably further out from the Oregon bank than said channel or fairway and it is not customary and it is improper to anchor vessels in said portion of said river so that they may swing on their moorage chains to a point closer than 400 or 500 feet from the Oregon bank. At the time of said collision, namely, about 1:44 A. M., October 26, 1924, said "Boston Maru" had swung on her anchor chain due to a rising tide, which caused a slight current upstream and due also possibly to a light southeast wind so that she lay squarely or almost squarely across the channel and fairway [10] of said river with her stern approximately 150 feet from the Oregon bank. Libelant is unable to say

whether or not her anchor chain was taut at said time. The night of said collision was very dark, without fog and clear and the visibility was good. The sky was cloudy with occasional light rains, although it was not raining at the time of said collision, nor had there been any rain for some time before said collision. There may have been a slight southeast wind on said night but said wind, if any, was light. At about 10:56 P. M., October 25, 1924, the said "West Keats" with all her proper navigating lights burning brightly, fully manned, equipped and in all respects seaworthy, let go her lines and left the dock at Municipal Terminal No. 4 St. Johns, Portland, Oregon, and started down the Willamette and Columbia Rivers in charge of a pilot duly licensed by the United States Steamboat Inspectors and by the Board of Pilot Commissioners of the State of Oregon, to pilot any vessel on the Willamette and Columbia Rivers. On reaching a point on the St. Helens Bar Range approximately 11½ miles above the place of collision, said pilot observed the riding lights of the said "Boston Maru" and assumed that said vessel was lawfully and properly anchored in the regular and customary anchorage grounds above described, and proceeded on down the river following the said range with the intention of following the ordinary channel and fairway and passing between said "Boston Maru" and the Oregon shore. On arriving at a point near the end of said St. Helens Bar Range and well over to the Oregon bank, said pilot caused the said "West Keats" to be turned a little to star-

board in order to follow down the Oregon shore with the purpose of passing between said "Boston Maru" and the Oregon shore and of getting on the Columbia City Range a little more than one-half mile below the point at which said vessel left the St. Helens Bar Range. Shortly thereafter it became evident to said pilot that said "Boston Maru" was lying with her stern so close to the Oregon shore as to render passage between the stern of said "Boston Maru" and the Oregon [11] shore difficult. At this time it was impossible for said "West Keats" to stop or turn to pass on the Washington side of said "Boston Maru" without greatly increasing the hazard of a collision and also the force and damage of a collision, if such should occur, and the only reasonable procedure on the part of the "West Keats" was to continue on and attempt to run the narrow passage between the "Boston Maru" and the Oregon shore. Said pilot of the "West Keats" determined to run the said passage. However, the suction of the water on the Oregon side tended to draw the stern of the "West Keats" toward the Oregon shore and although the helm of said vessel was thrown hard astarboard, it was impossible to keep the bow enough inshore to prevent a collision. The said "West Keats" struck said "Boston Maru" a glancing blow, the turn of the bow of the "West Keats" striking the counter of the "Boston Maru" and causing the damage herein alleged.

## V.

Said collision was due entirely to the fault of the

said "Boston Maru," its pilot, master, officers and crew in the following particulars:

1. Said "Boston Maru" was negligently anchored in the navigable channel or fairway at the point in question in such a manner as to prevent or obstruct the passage of other vessels along said channel or fairway in violation of Section 15 of an Act of Congress approved March 3, 1899, prohibiting the anchorage of vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.

2. Said "Boston Maru" was negligently anchored in violation of said Act of Congress so that with an incoming tide she would swing broadside or nearly broadside across the said channel and fairway, thereby obstructing the free passage of the same by other vessels. [12]

3. After coming to an anchor and at or before the time of the collision, said "Boston Maru" was negligently allowed to swing on her anchor chain broadside or nearly broadside to said channel and fairway and thereby obstruct the same and prevent and obstruct the passage thereof by other vessels.

4. The acts of negligence herein charged are charged to have been negligent and careless violations, not only of the said Act of Congress, but also of the laws, rules and regulations constituting and defining good seamanship, and the customs herein pleaded.

## VI.

As a result of said collision, a hole was torn in the starboard bow of the "West Keats" two or

three feet wide and thirty or forty feet long and numerous of her plates and frames were broken, torn, bent and otherwise displaced. Also one bulk-head was torn and broken, one deck beam bent and one hawse-pipe, three deck lights, one hawser reel and one vent pipe were broken, bent and damaged, requiring extensive repairs which are being made at the reasonable cost of \$7,250.00. In order to make said repairs it became necessary to move said vessel from the place of collision to Portland, Oregon, and discharge a portion of her cargo and thereby delay was incurred and further delay will be incurred prior to the completion of said repairs and the continuance of said "West Keats" on her said voyage. Due to the fact that the said "West Keats" is still in course of repair and the said delay has not terminated at the time of filing this libel, libelant is unable at the present time to state the particulars of the various additional damages to said vessel by reason of said delay, moving and the handling of the said cargo and the necessary surveys and the like, but prays for leave to file a bill of particulars of said additional damages after the filing of this libel and as soon as the same can be ascertained, and [13] libelant now estimates that said additional damages will aggregate in the neighborhood of \$10,000.00.

## VII.

All and singular the premises are true and within the admiralty jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that process in due form of law and according to the practice of this Honorable Court may issue against the said steamship "Boston Maru," her engines, boilers, tackle, apparel, furniture, etc., and that she may be condemned and sold to answer for the damages alleged in this libel, and that this Court will hear the evidence which libelant will adduce in support of the allegations of this libel and will enter a decree in favor of libelant for the above-mentioned damages and will order the same to be paid and satisfied out of the proceeds of said steamship "Boston Maru," together with interest and the costs of the libelant and will otherwise right and justice administer in the premises.

ALLEN H. BYNON,  
Assistant United States Attorney.  
MacCORMAC SNOW,  
Proctors for Libelant.

Filed November 8, 1924. [14]

---

AND AFTERWARDS, to wit, on the 10th day of November, 1924, there was duly filed in said court, a claim of owner of the "Boston Maru," in words and figures as follows, to wit: [15]

CLAIM.

Kokusai Kisen Kabushiki Kaisha, owner of the steamship "Boston Maru," her hull, engines, boilers, apparel and furniture, intervening for its own interest, appears before this Honorable Court and



makes claim to the said steamship, her hull, engines, boilers, apparel and furniture as the same are attached by the marshal under process of this court at the instance of United States of America, and the said Kokusai Kisen Kabushiki Kaisha avers that it was in possession of said steamship at the time of the attachment thereof, and that it is the true and *bona fide* owner of the said steamship and that no other person or corporation is the owner thereof.

WHEREFORE, claimant prays to defend accordingly.

KOKUSAI KISEN KABUSHIKI KAISHA.

By S. SAYEKI,  
Master of the "Boston Maru."

District of Oregon,—ss.

I, S. Sayeki, being duly sworn, do depose and say that I am master of the steamship "Boston Maru" and that the allegations contained in the foregoing claim are true.

S. SAYEKI.

Subscribed and sworn to before me this 10th day of November, 1924.

[Notarial Seal]

W. A. ILLIDGE,  
Notary Public for Oregon.

My commission expires Jan. 31, 1928.

Filed November 10, 1924. [16]

AND AFTERWARDS, to wit, on the 12th day of November, 1924, there was duly filed in said court, a stipulation of the claimant of the "Boston Maru" to abide by and pay decree, in words and figures as follows, to wit: [17]

STIPULATION OF "BOSTON MARU" to  
ABIDE BY AND PAY DECREE.

WHEREAS, a libel has been filed in the District Court of the United States for the District of Oregon by the United States of America against the steamship "Boston Maru," her hull, engines, boilers, apparel and furniture, in a certain action, civil and maritime, for alleged maritime tort; and

WHEREAS, the vessel is now in the custody of the marshal of this district under process issued in accordance with the prayer of said libellant; and

WHEREAS, a claim to said vessel has been filed by the Kokusai Kisen Kabushiki Kaisha and said vessel has been libeled in the amount of \$17,250, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its sureties, execution for the above amount, with interest thereon from this date and costs incurred in said action, may issue against its goods, chattels and lands:

NOW, THEREFORE, the condition of this stipulation is such that if claimant herein, a corporation organized and subsisting under the laws of the Empire of Japan shall abide by the orders of this court, interlocutory and final, and pay the amount

awarded by this court or any appellate court, if an appeal intervene, with interest, and also pay all costs and disbursements which may be adjudged against it in this cause or on an appeal from the decree herein, then this stipulation shall be [18] void; otherwise to remain in full force and virtue.

**KOKUSAI KISEN KABUSHIKI KAISHA.**

By SUZUKI & COMPANY, Ltd.,  
Agent.

**FIDELITY AND DEPOSIT COM-  
PANY OF MARYLAND.**

By R. E. PINNEY,  
Attorney-in-fact.

Examined and approved November 10, 1924.

CHAS. E. WOLVERTON,  
Judge.

Filed November 12, 1924. [19]

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AND AFTERWARDS, to wit, on the 17th day of November, 1924, there was duly filed in said court a stipulation to consolidate for the purpose of taking depositions and testimony and for trial, under the title "Boston Maru," cause numbered A.-9490, The United States of America, Libelant vs. the "Boston Maru," and cause numbered A.-9492, Kokusia Kisen Kabushiki Kaisha, a Japanese Corporation, Owner of the "Boston Maru," vs. The United States of America, in words and figures as follows, to wit: [20]

STIPULATION RE CONSOLIDATION OF  
CAUSES—No. A.-9492.

It is hereby stipulated by and between the United States of America, libelant in the first above-entitled causes and respondent in the second of the above-entitled causes, and Kokusia Kisen Kabushiki Kaisha, claimant in the first of the above-entitled causes and libelant in the second of the above-entitled causes, and their respective proctors, that the said causes may be consolidated for the purpose of taking depositions and testimony and for trial, under the more convenient title "The Steamship Boston Maru."

JOHN S. COKE,  
U. S. Atty.,

MacCORMAC SNOW,  
Proctors for United States of America.

McCAMANT & THOMPSON,  
RALPH H. KING,

Proctors for the said Kokusia Kisen Kabushiki  
Kaisha.

Filed November 17, 1924. [21]

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AND AFTERWARDS, to wit, on the 8th day of  
December, 1924, there was duly filed in said  
court an answer of the claimant of the "Boston  
Maru" to the libel of the United States of  
America, in words and figures as follows, to wit:  
[22]

ANSWER.

Comes now *Kokusai Kisen Kabushiki Kaisha*, claimant in the above-entitled cause, and for its answer to the libel herein admits, denies and alleges as follows:

I.

Admits the allegations of Article I.

II.

Admits the allegations of Article II.

III.

Answering the allegations of Article III, claimant admits that at about 1:44 A. M. on the morning of Sunday, October 26, 1924, a collision occurred between the "Boston Maru" and the "West Keats" in the waters of the Columbia River at a point opposite and near Columbia City, Oregon. Claimant denies each and every other allegation contained in said Article III.

IV.

Answering the allegations of Article IV, claimant admits that the night of the collision was very dark and without fog and clear, and that visibility was good. Claimant denies each and every other allegation contained in said Article IV.

V.

Claimant denies each and every allegation contained in Article V. [23]

VI.

Answering the allegations of Article VI, claim-

ant admits that the "West Keats" sustained injuries as a result of said collision, but claimant is not informed as to the nature and extent of said injuries and damage and requests that libelant make proof of the same.

VII.

Claimant denies each and every allegation contained in Article VII.

WHEREFORE, having fully answered the libel herein, claimant prays that said libel be dismissed, and that claimant have and recover from libelant its costs and disbursements herein.

McCAMANT & THOMPSON,  
RALPH H. KING,

Proctors for Claimant.

Filed December 8, 1924. [24]

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AND AFTERWARDS, to wit, on the 12th day of December, 1925, there was duly filed in said court a motion of the libelant, The United States of America, for bill of particulars, to consolidate causes, and to amend libel, in words and figures as follows, to wit: [25]

MOTION FOR LEAVE TO FILE BILL OF PARTICULARS, CONSOLIDATE CAUSES AND AMEND LIBEL.

Comes now the libelant and files herewith a bill of particulars of its damages and moves the Court as follows:

## I.

That respondent herein and libelant in the case of *Kokusai Kisen Kabushiki Kaisha vs. United States* be required to file its bill of particulars in said case.

## II.

That the above cause numbered 9490 and the case named in the preceding paragraph of this motion, numbered 9492, be consolidated for the purposes of taking depositions and testimony and for trial under the more convenient title, the "Steamship *Boston Maru*," in accordance with a stipulation to said effect heretofore filed.

## III.

That libelant be permitted to amend its libel herein by striking from page 6, line 2, thereof the figures "\$10,000.00," and inserting in place thereof the figures "\$17,002.03."

## IV.

That libelant herein be permitted to amend its libel to add after Article V, subparagraph 4, the following subparagraph: [26]

5. At the approach of the "West Keats" shortly and immediately before the said collision those on board the "Boston Maru" and responsible for her navigation and conduct although they well knew or had ample means of knowing that the "Boston Maru" had swung with the tide and was lying across the channel in that part thereof customarily followed at night by vessels going up and down stream, and although they well knew or had ample

means of knowing that the "West Keats" was proceeding in said customary track, namely, along the Oregon shore, failed to give to those in charge of the navigation of the "West Keats" any warning whatever of the unusual and dangerous position of the "Boston Maru" and failed to move the "Boston Maru" from said dangerous position.

V.

That an amendment be allowed to the libel so that the opening paragraph thereof will read as follows:

"The libel of the United States of America proceeding in the interests of all concerned in the matters hereinafter alleged against the Japanese steamer "Boston Maru," her engines, boilers, tackle, apparel, furniture, etc., alleges as follows:

MacCORMAC SNOW,  
Of Proctors for Libelant.

Filed December 12, 1925. [27]

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AND AFTERWARDS, to wit, on Saturday, the 6th day of February, 1926, the same being the 82d judicial day of the regular November term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [28]



ORDER ON MOTION FOR LEAVE TO FILE  
BILL OF PARTICULARS, CONSOLIDATE  
CAUSES AND AMEND LIBEL—Nos. A.-9490  
—A.-9492.

These causes entitled United States of America vs. The Japanese Steamship “Boston Maru,” etc., numbered 9490, and Kokusai Kisen Kabushiki Kaisha vs. The United States of America, numbered 9492, coming on to be heard on the motion of the United States filed in said cause 9490, and counsel for the “Boston Maru,” and her owners having consented to the allowance of said motion;

NOW, THEREFORE, IT IS ORDERED as follows:

1. Kokusai Kisen Kabushiki Kaisha is hereby directed to file a bill of particulars of its alleged damages and is allowed ten days within which to file the same.

2. The said two causes are hereby consolidated for the purpose of taking depositions and testimony and for trial under the more convenient title “Steamship Boston Maru.”

3. The libel of the United States shall be and is hereby considered amended by striking from page 6, line 2 thereof the figures \$10,000.00, and inserting in place thereof the figures \$17,002.03.

4. The libel of the United States shall be and is hereby amended to add after subparagraph 4 of Article V the following subparagraph:

“5. At the approach of the ‘West Keats’ shortly and [29] immediately before the said collision those on board the ‘Boston Maru’ and responsible for her navigation and conduct although they well knew or had ample means of knowing that the ‘Boston Maru’ had swung with the tide and was lying across the channel in that part thereof customarily followed at night by vessels going up and down stream and although they well knew or had ample means of knowing that the ‘West Keats’ was proceeding in said customary track, namely along the Oregon shore, failed to give to those in charge of the navigation of the ‘West Keats’ any warning whatever of the unusual and dangerous position of the ‘Boston Maru’ and failed to move the ‘Boston Maru’ from said dangerous position.”

5. The libel of the United States shall be and is hereby amended so that the opening paragraph thereof will read as follows:

“The libel of the United States of America proceeding in the interests of all concerned in the matters hereinafter alleged against the Japanese steamer ‘Boston Maru,’ her engines, boilers, tackle, apparel, furniture, etc., alleges as follows”:

Dated this 6th day of February, 1926.

CHAS. E. WOLVERTON,

Judge.

Filed February 6, 1926. [30]

AND AFTERWARDS, to wit, on the 28th day of June, 1926, there was duly filed in said court a motion of libelant, Kokusai Kisen Kabushiki Kaisha for leave to file an amended libel, in words and figures as follows, to wit: [31]

MOTION OF KOKUSAI KISEN KABUSHIKI  
KAISHA FOR LEAVE TO FILE AMENDED  
LIBEL—No. A.-9492.

Comes now the libelant, Kokusai Kisen Kabushiki Kaisha, by its proctors, McCamant & Thompson and Ralph H. King, and moves the Court for leave to file the amended libel herewith tendered.

McCAMANT & THOMPSON,  
RALPH H. KING,

Proctors for Libelant.

Filed June 28, 1926. [32]

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AND AFTERWARDS, to wit, on Tuesday, the 6th day of July, 1926, the same being the 2d judicial day of the regular July term of said court—Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: Order allowing libelant Kokusai Kisen Kaisha, Owner of the "Boston Maru," to File Amended Libel: [33]

ORDER ALLOWING LIBELANT KOKUSAI  
KISEN KABUSHIKI KAISHA TO FILE  
AMENDED LIBEL.

Now, at this day, come the libelant by Mr. Wallace McCamant, of proctors, and the respondent by Mr. MacCormac Snow, of proctors, whereupon this cause comes on to be heard by the Court on the motion of libelant for leave to file an amended libel, herein. And the Court, having heard the arguments of counsel,—

IT IS ORDERED that said motion be and the same is hereby allowed. [34]

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AND AFTERWARDS, to wit, on the 6th day of July, 1926, there was duly filed in said court an amended libel in cause No. A-9492, Kokusai Kisen Kabushiki Kaisha, as owner of the "Boston Maru," against the United States of America, in words and figures as follows, to wit:  
[35]

AMENDED LIBEL—No. A.-9492.

To the Honorable the Judges of the District Court  
of the United States for the District of Oregon:

The amended libel *in personam* of Kokusai Kisen Kabushiki Kaisha owner of the Japanese steamship "Boston Maru," against the United States of America as the owner of the American steamship "West Keats," in a case of collision civil and mari-

time, alleges as follows, consent of the Court to the filing of this amended libel having been duly obtained:

#### ARTICLE I.

At all times hereinafter mentioned libelant was and now is a corporation organized and existing under the laws of the Empire of Japan and was the owner of the steamship "Boston Maru," a vessel of about 8,800 tons gross and 400 feet in length.

#### ARTICLE II.

At all times hereinafter mentioned the United States of America was and now is the owner of the American steamship "West Keats"; that said steamship at all times hereinafter [36] mentioned was employed as a merchant vessel.

#### ARTICLE III.

At the filing of the original libel in this case the steamship "West Keats" was within the Port of Portland and within the District of Oregon, and the matters and things hereinafter set forth transpired within the District of Oregon and within the jurisdiction of this Honorable Court.

#### ARTICLE IV.

On Sunday, the 26th day of October, 1924, at about 1:45 o'clock A. M., a collision occurred between the steamships "Boston Maru" and "West Keats" in the navigable waters of the Columbia River near Columbia City, Oregon, by which the "Boston Maru" was seriously damaged, was compelled to return to the Port of Portland for repairs

and was delayed in putting to sea upon her contemplated voyage.

#### ARTICLE V.

Libelant alleges that the following are the circumstances of the collision:

On Saturday, the 25th day of October, 1924, the "Boston Maru" completed taking on cargo at the dock of the Clark & Wilson Lumber Company at Linnton, in the Port of Portland. The "Boston Maru" was placed in charge of and under the control of a pilot duly licensed to pilot steamships of the class and tonnage of the "Boston Maru" in the waters of the Columbia and Willamette Rivers. That said pilot was competent and qualified in all respects to perform the duties for which he was employed and particularly to navigate the "Boston Maru" in the Willamette and Columbia Rivers. That under the control and direction of said pilot the "Boston Maru" proceeded down [37] the Willamette River to its mouth, and thereafter down the Columbia River for the purpose of taking on additional cargo at the dock of Island Lumber Company near St. Helens, Oregon. That the "Boston Maru" at said time was loaded with lumber and rode low in the water drawing about 26 feet aft. That in order conveniently to reach the dock of Island Lumber Company near St. Helens, Oregon, it was necessary for the "Boston Maru" to go below St. Helens and to anchor awaiting the flood tide. That for this purpose the "Boston Maru" was navigated by the said pilot to a point off Columbia City Oregon, about 5 miles below the dock aforesaid at St.

Helens, Oregon. That the "Boston Maru" anchored about 900 feet from the Oregon shore off Columbia City, Oregon, about eight-thirty P. M. on the said 25th day of October, 1924; that the tide was ebbing at the time when the vessel anchored and the stage of the water did not permit a vessel drawing 26 feet to proceed up the channel to St. Helens, Oregon, and to the dock of Island Lumber Company. That the place where the said steamship was anchored is the customary and usual place of anchorage for vessels awaiting the flood stage of tide to proceed to St. Helens, Oregon, and the docks in and about said city. That all pilots and navigators operating in the Columbia River were well advised that there is an anchorage ground at and about the place where the "Boston Maru" was so anchored pursuant to the orders of its pilot, on said 25th day of October, 1924. That when the vessel was brought to anchor, her bow was upstream and her running lights were immediately extinguished. Thereupon the officers of the "Boston Maru" lighted and displayed her two anchor lights, one thereof on the forestay 36 to 37 feet above the hull, and the other thereof on the flagstaff near the stern of the "Boston Maru" and 16 to 17 feet above the hull. That the said anchor lights so displayed were white lights in lanterns so constructed [38] as to show a clear, uniform and unbroken light visible all around the horizon at a distance of not less than four miles.

That the "Boston Maru" continued to ride at anchor in the anchorage ground aforesaid and at

the same place where she was anchored as above set forth, and her anchor lights continued to burn and to be visible as aforesaid up to and after the moment of the collision hereinafter described.

That the steamship "West Keats" left the port of Portland on the evening of the 25th of October, 1924, and proceeded down the Willamette and Columbia rivers. That the visibility was good on the night in question and the anchorage ground selected by the "Boston Maru" was such that there was a clear view of her anchorage lights to vessels coming downstream for a long distance above the place where the vessel rode at anchor, to wit, for upwards of four miles.

That the "West Keats" entered the Columbia River about midnight between the 25th and the 26th days of October, 1924, and from that time until the collision hereinafter referred to proceeded at full speed. That the "West Keats" was fully loaded, and was a large vessel approximately 410 feet in length and 52 feet in beam, with a dead-weight of approximately 8,538 tons. That the lookout on the "West Keats," and the pilot and officers charged with her navigation negligently confused the anchor lights of the "Boston Maru" with lights upon the shore, although the pilot in charge of the "West Keats" well knew that there was an anchorage ground in the Columbia River off Columbia City at or about the place where the "Boston Maru" was anchored. That notwithstanding the said knowledge so possessed by the said pilot he wholly failed to reverse the engines or otherwise



to check the speed of the "West Keats," but continued at full speed until practically the moment of the collision. That although there was ample room for the "West Keats" to pass the "Boston Maru" between the [39] "Boston Maru" and the Washington shore, and although such passage was required by Section 7899 of United States Compiled Statutes, the pilot and officers in charge of the navigation of the "West Keats" undertook to pass between the "Boston Maru" and the Oregon shore. That the "West Keats" was so negligently and carelessly navigated that the starboard bow of the "West Keats" struck the starboard stern quarter of the "Boston Maru," causing serious injury to the "Boston Maru."

#### ARTICLE VI.

The collision aforesaid, and the loss, damage and destruction resulting therefrom were not caused or contributed to by any negligence on the part of the steamship "Boston Maru," or anyone for whom the said steamship can be held responsible, but were due solely to the acts and negligences of the steamship "West Keats," her owners and those in charge of her navigation, in the following respects, to wit:

1. The "West Keats" was not under the command or direction of a competent master or pilot.

2. The lookout on the "West Keats" failed to observe the anchorage lights of the "Boston Maru" until practically the moment of the collision.

3. The lookout on the "West Keats" failed to report the presence of the "Boston Maru" to the

pilot in charge of the navigation of the "West Keats" and to the officer of the "West Keats," who was on the bridge, until practically the moment of the collision.

4. The pilot in charge of the "West Keats," and the officers charged with her navigation, confused the anchor lights of the "Boston Maru" with lights on the Oregon shore and failed to recognize the presence [40] of the "Boston Maru" until practically the moment of the collision, although the said pilot was chargeable with notice that there was an anchorage ground off Columbia City, including the place at which the "Boston Maru" was anchored.

5. The "West Keats" failed to reverse her engines or to check her speed when the anchor lights of the "Boston Maru" became visible, but, on the contrary, the "West Keats" proceeded at full speed, in the night, while approaching the anchorage ground in which the "Boston Maru" was anchored.

6. The "West Keats" failed to keep on the starboard side of the channel as required by Section 7899 of United States Compiled Statutes.

7. Although the "Boston Maru" was anchored and stationary, and the "West Keats" was in motion, and the lights of the "Boston Maru" were visible to the lookout and officers in charge of the "West Keats" for a distance of four miles above the place where the "Boston Maru" was anchored, the "West Keats" was so negligently navigated

and steered that she collided at full speed with the "Boston Maru."

8. That although there was ample room between the "Boston Maru" and the Washington shore, and ample depth of water for the navigation of the "West Keats" therein, the pilot and officers in charge of the "West Keats" elected to pass between the "Boston Maru" and the Oregon shore.

9. Either because of the negligence of the pilot and officers of the "West Keats" in navigating her, or because her steering-gear was out of order, the "West Keats" [41] failed to respond to her helm and to steer in accordance with the orders last given by the pilot of the "West Keats" prior to the collision.

#### ARTICLE VII.

Libelant further alleges that by reason of the said collision it was necessary for the steamship "Boston Maru" to return to Portland for repairs, and that the making of the said repairs delayed and detained the "Boston Maru" for a period of seventeen days. That the reasonable charter value of the "Boston Maru" at the time of the said collision was the sum of four hundred dollars (\$400.00) per day and the loss of the vessel by reason of said detention was approximately the sum of sixty-eight hundred dollars (\$6,800.00). That the damages sustained by the vessel in the collision, and the cost of repairing her were a large additional sum of money, being approximately the sum of eleven thousand dollars (\$11,000.00) and that libelant's total damages as the result of the said collision are

approximately the sum of eighteen thousand dollars (\$18,000.00).

### ARTICLE VIII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of this court.

WHEREFORE, libelant prays that this Honorable Court be pleased to decree the payment of the damages suffered by the libelant, as aforesaid, together with its costs and disbursements and that libelant may have such and further relief as in law and justice it is entitled to receive.

McCAMANT & THOMPSON,  
RALPH H. KING,

Proctors for Libelant.

Filed July 6, 1926. [42]

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AND AFTERWARDS, to wit, on the 10th day of September, 1926, there was duly filed in said court an answer of the United States of America to the libel of the Kokusai Kisen Kabushiki, owner of the "Boston Maru," in words and figures as follows, to wit: [43]

ANSWER TO AMENDED LIBEL—No. A.-9492.

Comes the United States of America and in answer to the amended libel of the owner of the steamship "Boston Maru" admits, denies, and alleges as follows:

I.

Denies knowledge of the allegations of Article I of the amended libel and calls for proof of the same.

II.

Admits the allegations of Article II of the amended libel, but denies that the United States is now the owner of said steamship "West Keats."

III.

Admits the allegations of Article III of the amended libel.

IV.

Admits the allegations of Article IV of the amended libel, but denies the time of the collision as therein alleged.

V.

Denies each and every allegation of Article V of the amended libel except as herein expressly admitted. [44]

VI.

Denies each and every allegation of Article VI of the amended libel except as herein expressly admitted.

VII.

Denies each and every allegation of Article VII of the amended libel except as herein admitted and admits that the damages suffered by the owner of the "Boston Maru" on account of said collision were and are the sum of fifteen thousand seven hundred eighty-eight and ninety-one/100 dollars (\$15,788.91).

VIII.

Admits the jurisdiction of the court as alleged in

Article VIII of the amended libel, but denies each and every other allegation of said article.

WHEREFORE, respondent having fully answered prays that the amended libel be dismissed and that respondent have and recover its costs and disbursements herein.

GEORGE NEUNER,  
United States Attorney,  
MacCORMAC SNOW,

Proctors for Respondent, United States of America.

Filed September 10, 1926. [45]

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AND AFTERWARDS, to wit, on the 7th day of August, 1926, there was duly filed in said court a stipulation relative to damages, in words and figures as follows, to wit: [46]

STIPULATION RE DAMAGES—Nos. A.-9490—  
A.-9492.

IT IS HEREBY STIPULATED by and between the parties hereto and their respective proctors, that the damages suffered by the United States by reason of the collision between the "Boston Maru" and the "West Keats," referred to in the pleadings filed in these consolidated cases, were and are fifteen thousand six hundred forty-two and twelve/100 dollars (\$15,642.12), and the damages of Kokusai Kisen Kabushiki Kaisha, by reason of the said collision, were and are fifteen thousand seven hundred

eighty-eight and ninety-one/100 dollars (\$15,788.-91), and that no other damages were suffered by any parties interested herein by reason of said collision except the foregoing. The said damages do not include taxable costs and disbursements.

McCAMANT & THOMPSON,  
Proctors for Owners of "Boston Maru."  
MacCORMAC SNOW,  
Proctors for Owners of "West Keats."

Filed August 7, 1926. [47]

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AND AFTERWARDS, to wit, on the 28th day of October, 1926, there was duly filed in said court a stipulation relative to photographs, in words and figures as follows, to wit: [48]

STIPULATION RE PHOTOGRAPHS — Nos.  
A.-9490—A.-9492.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective proctors, that there may be offered on behalf of the "Boston Maru," in the taking of the testimony in the above causes, photographs which bear the endorsement "O. K.; M. S.; R. H. K.," said photographs also being severally endorsed on the back " "Boston Maru," Photographs A, B, C, D, E, F, G, H, I and J," and that said photographs shall be competent evidence without proof of the time, place or person who took them.

IT IS FURTHER STIPULATED that said Photographs A, B, C, D and E are true photographs

of the steamship "Boston Maru," and show the condition of the starboard quarter of the stern of said steamship "Boston Maru" immediately after the time of the collision of the steamship "West Keats" with the said "Boston Maru" and prior to the making of any repairs thereto.

IT IS FURTHER STIPULATED that Photograph F portrays the view under deck aboard the steamship "West Keats" at the hawse-pipe on the starboard of the bow of the "West Keats," and that the condition shown was such as existed immediately after the collision of the "West Keats" with the "Boston Maru," and prior to any repairs being made thereto.

IT IS FURTHER STIPULATED that the Photograph G shows the under deck view of the "West Keats" on the starboard bow aft of the hawse-pipe on the starboard bow, and shows such condition as [49] existed immediately after the collision of the "West Keats" with the "Boston Maru" and prior to the making of any repairs thereto.

IT IS FURTHER STIPULATED that Photograph H was a photograph taken of the steamship "West Keats" shortly after the collision of the "West Keats" with the "Boston Maru," and that the said photograph shows the appearance of the "West Keats" immediately after said collision and prior to any repairs being made thereto.



Dated October 4th, 1926.

McCAMANT & THOMPSON.  
McCAMANT & THOMPSON,  
RALPH H. KING,  
RALPH H. KING,

Proctors for Owners of "Boston Maru."

MacCORMAC SNOW.

MacCORMAC SNOW,

Proctors for Owners of "West Keats."

Filed October 28, 1926. [50]

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AND AFTERWARDS, to wit, on Monday, the 22d day of November, 1925, the same being the 19th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [51]

DECREE—Nos. A.-9490 and A.-9492.

IT APPEARING that causes numbered 9490 and 9492, by stipulation of the parties and by order of this Court, have been consolidated under the above title, and the cause having been fully tried out and taken under advisement, the Court being fully advised thereon,—

The Court finds that the "Boston Maru" was anchored at a suitable place in the Columbia River at the time of the collision and that it would not have been good seamanship to have anchored the

said vessel materially closer to the Washington shore for the reason that the vessel in such event might have swung on to a gravel shoal marked on the chart; the Court also finds that the anchor lights of the "Boston Maru" were in position and burning brightly; the Court also finds that the pilot of the "West Keats" observed the anchor lights of the "Boston Maru" when about a mile and one-half upstream from her and the pilot knew at that time that a vessel was at anchor athwart the stream; that notwithstanding such knowledge the pilot of the "West Keats" neglected to slacken the speed of his vessel or to take any precaution to ascertain the actual location of the anchored vessel, and that the "West Keats" proceeded downstream at full speed until a short distance above the "Boston Maru"; that thereupon the pilot of the "West Keats" endeavored to pass to the left of the "Boston Maru." That the negligence of the pilot of the "West Keats" in the respects aforesaid is solely responsible for the collision.

IT IS, THEREFORE, CONSIDERED, ADJUDGED AND DECREED that the libel of the United States of America against the steamship [52] "Boston Maru" is dismissed.

IT IS FURTHER CONSIDERED, ADJUDGED AND DECREED that Kokushai Kisen Kabushiki Kaisha do have and recover of the United States the full sum of fifteen thousand seven hundred eighty-eight and 91/100 dollars (\$15,788.91), with interest thereon at the rate of four per cent (4%) per annum from the 26th day

of October, 1924, and the costs and disbursements incurred, on behalf of the Japanese steamship "Boston Maru," herein and in the suits consolidated as aforesaid, taxed at \$212.60.

R. S. BEAN,  
Judge.

Dated November 22, 1926.

Filed November 22, 1926. [53]

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AND AFTERWARDS, to wit, on the 17th day of February, 1927, there was duly filed in said court a notice of appeal, by the libelant, in cause No. A.-9490, The United States of vs. The "Boston Maru," in words and figures as follows, to wit: [54]

NOTICE OF AND PETITION FOR APPEAL  
—No. A.-9490.

To the Honorable Judges of the Above-entitled Court:

The libelant above-named, United States of America, feeling itself aggrieved by that certain final judgment and decree entered in the above-entitled court November 22, 1926, does hereby appeal from said judgment and decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignments of error filed herewith and hereby gives notice to the claimant above named of such appeal, and now prays that its said appeal be allowed and

that a citation be issued as provided by law and that a transcript of all proceedings of record in the above-entitled court and cause necessary to prosecute properly said appeal duly certified and authenticated be sent to said Circuit Court of Appeals as provided by law and by the rules of said court.

GEORGE NEUNER,  
United States Attorney,  
MacCORMAC SNOW,  
Proctors for Libelant and Appellant.

Filed February 17, 1927. [55]

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AND AFTERWARDS, to wit, on the 17th day of February, 1927, there was duly filed in said court a notice of appeal, by the respondent, the United States of America, in cause No. A.-9492, Kokushai Kisen Kabushiki Kaisha, Owner of the "Boston Maru," Libelant, vs. The United States of America, in words and figures as follows, to wit: [56]

NOTICE OF AND PETITION FOR APPEAL  
—No. A.-9492.

To the Honorable Judges of the Above-entitled Court:

The respondent above-named, United States of America, feeling itself aggrieved by that certain final judgment and decree entered in the above-entitled cause by the above-entitled court Novem-

ber 22, 1926, does hereby appeal from said judgment and decree and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignments of error filed herewith and hereby gives notice to the libelant above named of such appeal, and now prays that its said appeal be allowed and that a citation be issued as provided by law and that a transcript of all proceedings of record in the above-entitled court and cause necessary to prosecute properly said appeal duly certified and authenticated be sent to said Circuit Court of Appeals as provided by law and by the rules of said court.

GEORGE NEUNER,  
United States Attorney,  
MacCORMAC SNOW,  
Proctors for Respondent and Appellant.

Filed February 17, 1927. [57]

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AND AFTERWARDS, to wit, on the 17th day of February, 1927, there was duly filed in said court an assignment of errors, on the appeal of the United States of America, libelant, in cause No. A.-9490, in words and figures as follows, to wit: [58]

ASSIGNMENTS OF ERROR—No. A.-9490.

Comes now the libelant appearing by George Neuner, United States Attorney, and MacCormac Snow, its proctors, and says that the final judg-

ment and decree of this court made and entered in the above-entitled cause November 22, 1926, in favor of the claimant above named and against this libelant is erroneous and against the just rights of said libelant and files herein together with its notice of and petition for appeal from the said judgment the following assignments of error which the said libelant says and avers occurred upon the trial of said cause:

#### I.

The Court erred in holding that the steamship "Boston Maru" was anchored in such a way as not to impede or obstruct the passage of other vessels or craft.

#### II.

The Court erred in holding that there is no established anchorage ground at the part of the Columbia River in which the collision occurred.

#### III.

The Court erred in holding that the evidence failed to show an established anchorage ground off or below Columbia City [59] and nearer to the Washington than to the Oregon side of the channel of the Columbia River.

#### IV.

The Court erred in holding that those on board the "Boston Maru" were not at fault in anchoring the said vessel at the place where the evidence showed she was anchored and in allowing her to swing with the incoming tide across the part of the channel of the river customarily used and established as the navigating channel thereof by the lo-

cation of the St. Helens Bar Range and Columbia City Range.

V.

The Court erred in holding that the burden of proof was on the owners of the "West Keats" to show that the collision was not due to the fault of those in charge of the navigation of the "West Keats."

VI.

The Court erred in holding that the collision was due entirely to the fault of those in charge of the navigation of the "West Keats."

VII.

The Court erred in holding that the collision was not proximately caused by the negligence of those in charge of the "Boston Maru" in anchoring said vessel improperly and allowing her to drift across the main ship channel, and in failing to warn the approaching "West Keats" of the position of the "Boston Maru" and in failing to get the "Boston Maru" out of the track of the approaching "West Keats."

VIII.

The Court erred in entering its decree holding the owners of the "West Keats" solely liable for the collision. [60]

IX.

The Court erred in failing to hold that the steamship "Boston Maru" and her owners and agents were solely responsible for the collision and in failing to find them so responsible and in failing to assess the entire damages of the said collision against

the said steamship and her owners and stipulators.

X.

The Court erred in finding that it would not have been good seamanship to anchor the "Boston Maru" materially closer to the Washington shore than said vessel was anchored.

XI.

The Court erred in finding that the "West Keats" was at fault in proceeding at full speed until a short distance above the "Boston Maru."

XII.

The Court erred in holding that those in charge of the navigation of the "Boston Maru" were not at fault in preventing the unnecessary encroachment of said vessel on the main ship channel and fairway by using the stern anchor of the "Boston Maru" or her engines, or any other proper means to prevent such encroachment.

XIII.

The Court erred in holding that the "Boston Maru" was not at fault for anchoring so as to allow said vessel to swing with the incoming tide to a point proximately across the intersection and joining of the St. Helens Bar Range and the Columbia City Range.

XIV.

The Court erred in holding that the belief of the pilot of the "West Keats" that the "Boston Maru" was in the usual and customary anchorage was unreasonable and that the said pilot should have slackened the speed of the "West Keats" in order



to determine the location of the "Boston Maru" and that any such [61] slowing up would have been a safe and proper maneuver.

WHEREFORE, said libelant and appellant prays that the judgment of the above-entitled court be reversed with directions to said Court to enter a judgment and decree against the claimant above named and its stipulator in the sum of fifteen thousand six hundred forty-two and twelve/100 (\$15,-642.12), together with its costs and disbursements in the District Court and in the Circuit Court of Appeals.

GEORGE NEUNER,  
United States Attorney,  
MacCORMAC SNOW,  
Proctors for Libelant and Appellant.

Filed February 17, 1927. [62]

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AND AFTERWARDS, to wit, on the 17th day of February, 1927, there was duly filed in said court an assignment of errors on the appeal of the respondent, The United States of America, in cause No. A.-9492, in words and figures as follows, to wit: [63]

ASSIGNMENTS OF ERROR—No. A.-9492.

Comes now the respondent in the above-entitled case, appearing by George Neuner, United States Attorney, and MacCormac Snow, its proctors, and says that the final judgment and decree of this

court made and entered in the above-entitled cause November 22, 1926, in favor of the libelant above named and against this respondent is erroneous and against the just rights of this respondent and files herein together with its notice of and petition for appeal from the said judgment the following assignments of error which the respondent says and avers occurred upon the trial of said cause:

### I.

The Court erred in holding that the steamship "Boston Maru" was anchored in such a way as not to impede or obstruct the passage of other vessels or craft.

### II.

The Court erred in holding that there is no established anchorage ground at the part of the Columbia River in which the collision occurred.

### III.

The Court erred in holding that the evidence failed [64] *an* established anchorage ground off or below Columbia City and nearer to the Washington than to the Oregon side of the channel of the Columbia River.

### IV.

The Court erred in holding that those on board the "Boston Maru" were not at fault in anchoring the said vessel at the place where the evidence showed she was anchored and in allowing her to swing with the incoming tide across the part of the channel of the river customarily used and established as the navigating channel thereof by the lo-

cation of the St. Helens Bar Range and Columbia City Range.

V.

The Court erred in holding that the burden of proof was on the owners of the "West Keats" to show that the collision was not due to the fault of those in charge of the navigation of the "West Keats."

VI.

The Court erred in holding that the collision was due entirely to the fault of those in charge of the navigation of the "West Keats."

VII.

The Court erred in holding that the collision was not proximately caused by the negligence of those in charge of the "Boston Maru" in anchoring said vessel improperly and allowing her to drift across the main ship channel, and in failing to warn the approaching "West Keats" of the position of the "Boston Maru" and in failing to get the "Boston Maru" out of the track of the approaching "West Keats."

VIII.

The Court erred in entering its decree holding the owners of the "West Keats" solely liable for the collision. [65]

IX.

The Court erred in failing to hold that the steamship "Boston Maru" and her owners and agents were solely responsible for the collision and in failing to find them so responsible and in failing to assess the entire damages of the said collision

against the said steamship and her owners and stipulators.

### X.

The Court erred in finding that it would not have been good seamanship to anchor the "Boston Maru" materially closer to the Washington shore than said vessel was anchored.

### XI.

The Court erred in finding that the "West Keats" was at fault in proceeding at full speed until a short distance above the "Boston Maru."

### XII.

The Court erred in holding that those in charge of the navigation of the "Boston Maru" were not at fault in preventing the unnecessary encroachment of said vessel on the main ship channel and fairway by using the stern anchor of the "Boston Maru" or her engines, or any other proper means to prevent such encroachment.

### XIII.

The Court erred in holding that the "Boston Maru" was not at fault for anchoring so as to allow said vessel to swing with the incoming tide to a point proximately across the intersection and joining of the St. Helens Bar Range and the Columbia City Range.

### XIV.

The Court erred in holding that the belief of the pilot of the "West Keats" that the "Boston Maru" was in the usual and customary anchorage was unreasonable and that said pilot should have slackened the speed of the "West Keats" in order to

[66] determine the location of the "Boston Maru" and that any such slowing up would have been a safe and proper maneuver.

WHEREFORE, The said respondent prays that the judgment of the above-entitled court be reversed with directions to the said court to dismiss the libel and amended libel herein and to enter a judgment against said libelant and in favor of said respondent for the costs and disbursements of said respondent in this court and in said Circuit Court of Appeals.

GEORGE NEUNER,  
United States Attorney.  
MacCORMAC SNOW,  
Proctors for Respondent.

Filed February 17, 1927. [67]

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AND AFTERWARDS, to wit, on Thursday, the 17th day of February, 1927, the same being the 92d judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: Order Allowing Appeal of the Libelant, The United States: [68]

ORDER ALLOWING APPEAL—No. A.-9490.

This cause coming on to be heard on the notice of and petition for appeal of the libelant through its proctors George Neuner, United States Attor-

ney, and MacCormac Snow, from the final order, judgment and decree in this court made and entered November 22, 1926, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit, and this Court being fully advised in the premises:

**IT IS, NOW, CONSIDERED AND ORDERED** That said appeal be and it is hereby allowed as prayed for and the Clerk of this court is hereby directed to prepare and formulate a true copy and transcript of the records and proceedings of the above-entitled cause in this court to the extent necessary to prosecute properly said appeal all duly compared, certified and authenticated and to send the same to the Clerk of said Circuit Court of Appeal for the Ninth Circuit.

Done in open court this 17th day of February, 1927.

R. S. BEAN,  
Judge.

Filed February 17, 1927. [69]

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AND AFTERWARDS, to wit, on Thursday, the 17th day of February, 1927, the same being the 92d judicial day of the regular November term of said Court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: Order Allowing Appeal of the Respondent, The United States: [70]

ORDER ALLOWING APPEAL—No. A.-9492.

This cause coming on to be heard on the notice of and petition for appeal of the respondent through its proctors, George Neuner, United States Attorney, and MacCormac Snow, from the final order, judgment and decree of this court made and entered November 22, 1926, and the whole thereof to the United States Circuit Court of Appeals for the Ninth Circuit, and this Court being fully advised in the premises:

IT IS, NOW, CONSIDERED AND ORDERED That said appeal be and it is hereby allowed as prayed for and the Clerk of this court is hereby directed to prepare and formulate a true copy and transcript of the records and proceedings of the above-entitled cause in this court to the extent necessary to prosecute properly said appeal all duly compared, certified and authenticated and to send the same to the Clerk of said Circuit Court of Appeal for the Ninth Circuit.

Done in open court this 17th day of February, 1927.

R. S. BEAN,  
Judge.

Filed February 17, 1927. [71]

AND AFTERWARDS, to wit, on the 17th day of February, 1927, there was duly filed in said court a petition of appellant for further consolidation of causes, in words and figures as follows, to wit: [72]

PETITION FOR FURTHER CONSOLIDATION OF CAUSES—Nos. A.-9490—A.-9492.

Comes the United States of America, libelant in the above-entitled cause numbered A-9490, and respondent in the above-entitled cause numbered A-9492, and respectfully petitions the above-entitled court and thereupon shows as follows:

The said two causes were heretofore consolidated for trial by the above-entitled court and on November 22, 1926, a consolidated decree was entered in both of said causes, from which decree the United States of America has filed a notice of and petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit, together with assignments of error in each of said causes, and has secured in each of said causes the entry of an order allowing the said appeals. The convenience of the said Circuit Court of Appeals and of this court and of the parties calls for a further consolidation of the said causes for any and all purposes [73] connected with the said appeals including the preparation of a single record for and covering both causes and the consideration, briefing, argument, opinion, judgment, mandate and decree of and by said Circuit Court of Appeals.



WHEREFORE, United States of America prays that said causes be further consolidated for any and all purposes touching upon and connected with the said respective appeals.

GEORGE NEUNER,  
United States Attorney.  
MacCORMAC SNOW,

Proctors for United States of America.

Filed February 17, 1927. [74]

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AND AFTERWARDS, to wit, on Thursday, the 17th day of February, 1927, the same being the 92d judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [75]

ORDER OF FURTHER CONSOLIDATION OF  
CAUSES—No. A.-9490—No. A.-9492.

The above-entitled consolidated causes both and each coming on to be heard on the petition of the United States of America for the further consolidation of said causes, and it appearing that appeals have been taken by the United States from the consolidated decree in both of the above-entitled causes to the United States Circuit Court of Appeals for the Ninth Circuit and that the convenience of said Circuit Court of Appeals and this court and the parties calls for further consolidation of said

causes for any and all purposes connected with said appeals, and each of them, including the preparation of a single record for and covering both of said causes and the consideration, briefing, argument, opinion, judgment, mandate and decree in said causes by said Circuit Court of Appeals: [76]

NOW, THEREFORE, IT IS CONSIDERED AND ORDERED That the said causes be further consolidated for any and all purposes touching upon and connected with the said respective appeals in each of said causes and that said appeals be consolidated for consideration of the same together under the more convenient title, "The Japanese Steamship 'Boston Maru,'" by said Circuit Court of Appeals.

Done in open court this 17th day of February, 1927.

R. S. BEAN,  
Judge.

Filed February 17, 1927. [77]

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AND AFTERWARDS, to wit, on the 18th day of February, 1927, there was duly filed in said court a stipulation for order to send original exhibits to the Court of Appeals, in words and figures as follows, to wit: [78]

STIPULATION RE TRANSMISSION OF  
ORIGINAL EXHIBITS — Nos. A.-9490 —  
A.-9492.

IT IS HEREBY STIPULATED by and between the parties hereto and their respective proctors that

all of the original exhibits in the above-entitled consolidated causes shall be sent by the Clerk of the above-entitled court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to accompany the apostles.

GEORGE NEUNER,  
United States Attorney.  
MacCORMAC SNOW,  
Proctors for Appellant.  
McCAMANT & THOMPSON,  
Proctors for Respondent.

It is so ordered February 18, 1927.

R. S. BEAN,  
Judge.

Filed February 18, 1927. [79]

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AND AFTERWARDS, to wit, on the 18th day of February, 1927, there was duly filed in said court a praecipe for apostles on appeal, in words and figures as follows, to wit: [80]

PRAECIPE FOR APOSTLES ON APPEAL—  
Nos. A.-9490—A.-9492.

Comes the appellant in the above-entitled consolidated cases and requests the Clerk of the above-entitled court to prepare, authenticate properly and file with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law and the rules of said court the consolidated apostles of the above cases, omitting captions, titles, verifications, signatures, proofs of

service and filing certificates but reciting generally that the papers therein were properly entitled, verified, executed, served and filed and showing the filing dates and the numbers of the respective cases wherein the various papers were filed, such record to consist of the following documents and papers:

9490—Libel.

9490—Claim.

9490—Stipulation for value showing signatures and execution.

9490, 9492—Stipulation for consolidation.

9490—Motion to amend libel.

9490, 9492—Order amending libel in 9490 and consolidating.

9490—Answer.

9492—Amended libel.

9490, 9492—Stipulation as to damages showing signatures.

9492—Answer to amended libel.

9490, 9492—Stipulation as to photographs.

9490, 9492—Decree.

9490, 9492—Opinion.

9490—Notice of and petition for appeal.

9492—Notice of and petition for appeal.

9490—Assignments of error.

9492—Assignments of error.

9490—Order allowing appeal.

9492—Order allowing appeal.

9490—Citation on appeal.

9492—Citation on appeal.

9490, 9492—Petition for further consolidation.

9490, 9492—Order of further consolidation.

9490, 9492—This praecipe. [81]

Depositions of:

9490, 9492—Gillette. Sayeki.

9490, 9492—Swenson. Chiga.

9490, 9492—Gidlof. Tomita.

9490, 9492—Bergreth. Yokoi.

9490, 9492—Jett. Komiyama.

9490, 9492—Evidence.

9490, 9492—All exhibits.

9490, 9492—Stipulation on original exhibits.

GEORGE NEUNER,  
United States Attorney.  
MacCORMAC SNOW,  
Proctors for Appellant.

Filed February 18, 1927. [82]

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AND there was duly filed in said court testimony taken before the court on the final hearing and depositions, in words and figures as follows, to wit: [83]

In the District Court of the United States for the  
District of Oregon

The “BOSTON MARU.”

BE IT REMEMBERED that the above-entitled case came on to be heard before the Honorable Robert S. Bean, Judge of the above-entitled court, on Tuesday, the 26th day of October, 1926, at the hour of ten o'clock A. M., the “Boston Maru” being

represented by Messrs. Wallace McCamant and Ralph H. King, its proctors, and the "West Keats" being represented by Mr. MacCormac Snow, its proctor.

WHEREUPON the following proceedings were had: [84]

Mr. KING.—We have entered into a stipulation with respect to the introduction of some photographs which have been handed the reporter.

(Pictures introduced in evidence as "Boston Maru's" Exhibits "A" to "K," inclusive.)

#### TESTIMONY OF R. E. HIXON, FOR THE GOVERNMENT.

R. E. HIXON, a witness called in behalf of the "West Keats," being first duly sworn testified as follows:

##### Direct Examination.

(Questions by Mr. SNOW.)

You are an engineer?     A. Yes, sir.

Q. By whom employed?

A. United States Government.

Q. In what office and department?

A. War department, engaged in river and harbor improvements.

Mr. KING.—We may shorten this by admitting Mr. Hixon's qualifications.

Q. You are familiar then with the Columbia River and shoals and ranges and matters of that kind, are you?     A. Yes, sir.

(Testimony of R. E. Hixon.)

Q. Were you employed to make a blue-print on behalf of the owners of the "West Keats," in this case? A. Yes, sir.

Q. I will hand you a blue-print and ask you to identify it. Is that the blue-print you prepared?

A. Yes, sir.

Mr. SNOW.—Now will counsel stipulate the tracing from which the blue-print is made, so that I may confine the testimony to the additional lines of red and yellow the witness has put on it.

Mr. KING.—It is one of the regular blue-prints in [85] your office?

A. Yes.

Mr. KING.—We will stipulate that fact, your Honor.

Q. Referring to the red and yellow lines on that blue-print, who placed those there? A. I did.

Q. And they were correctly placed as to location and scale? A. Yes, sir.

Q. Are they in accordance with the scale of the blue-print? A. Yes.

COURT.—What do you mean by "in accordance with the scale of the blue-print"? What do they represent? What do you place with reference to the scale of the blue-print?

Mr. SNOW.—I will take that up now.

Q. There are marks representing position, initial position, and position at collision. What do those marks represent?

A. These lines through these various lines here, red lines, mark the bearings as observed or given

(Testimony of R. E. Hixon.)

to me, to these lines, to the intersection, or close to the intersection at the initial position of the ship.

Q. Have you the bearings on the blue-print?

A. These show on each of these lines.

Q. You got those bearings from me, did you?

A. Yes, sir.

Q. What does the dotted line of the ship represent? What ship does that describe?

A. That is the position of the "Boston Maru."

Q. Is that drawn to scale?

A. The ship is drawn to scale; the other drawings of course are directions more than scales.

Q. How long is the "Boston Maru"?

A. Four hundred feet.

Q. That figure was given you by me, was it not?

A. Yes, sir.

Q. And that is the outline—do the two outlines of the "Boston [86] Maru" as shown on the blue-print represent a distance of four hundred feet, in comparison with the scale of the blue-print itself?

A. Yes, sir.

Q. Are the lines showing the bearings to these various lines correctly placed as to direction?

A. Yes, sir.

Q. Where the marks are shown, width of river, width of channel, state whether or not those marks are correct?

A. Those are scaled from drawings. It is scaled and shown correctly here.

Q. There are three long yellow lines on the blue-print, all of them broken lines, and one of them is



(Testimony of R. E. Hixon.)

marked "Line F. R. 28-2," to "F. R. 27-2"; describe that line?

A. Those lines—that line is a line drawn through this light along St. Helens jetty.

Q. What is that light?     A. Fixed red light.

Q. What is the number?

A. St. Helens lower fixed red.

Q. What number is it?

A. No number for it shown. This part of the chart refers to this dike, this number of this dike; that is the official name, I take it, of that light, as described by the Lighthouse Bureau which names all the lights on the rivers and gives them some designation.

Q. St. Helens lower?

A. St. Helens lower, yes.

Q. F. R. refers to what?     A. Fixed red.

Q. What other light does that line run through?

A. Runs through this light on this dike up here, 27-2.

Q. Number 28-2 and 27-2, they refer to the dike or jetty rather [87] than to the lights, do they not?     A. Yes, sir.

Q. And just as a matter of interest, how are those numbers given? Do they represent any distance?

A. Those numbers represent distance or location from Portland. The distance to this dike twenty-seven and two tenths miles—nearest tenth of a mile; this will be twenty-eight and two tenths.

Q. Statute or nautical miles?

(Testimony of R. E. Hixon.)

A. Statute miles.

Q. I notice the direction red line extended through these two lines extends to the end of the chart?

A. Yes.

Q. That extension is made straight, is it?

A. Yes.

Q. With a straight edge?      A. Yes.

Q. Now describe the yellow line marked "Line Lamont Point, F. W."      A. Courthouse flag.

Q. To the courthouse flag?

A. That is a straight line drawn through the light marked "Lamont F. W." and the flag on the courthouse at St. Helens.

Q. And extended on out?

A. Extended on down to the limits of the chart.

Q. Describe the line marked "Line from Caples Point to Lamont Light."

A. That is a line drawn through Caples Point, which is down off this chart, and to Lamont Light.

Q. On which side of the river is Caples Point?

A. Caples Point is on the Washington side of the river.

Q. Is it below river from the part of the river shown on this chart?

A. It is downstream here.

Q. About how far?

A. Half a mile or such a matter, something like that.

Q. From the end of this chart?      A. Yes.

Q. Describe the circles with marks in the, "Half mile nautical" and "half mile statute," and the like.

(Testimony of R. E. Hixon.)

There are several circles. [88] Describe them all.

A. These denote the distance from the point of collision downstream; that is, this red circle with the half mile in it is half a statute mile from the position of the "Boston Maru" at the time of the collision.

COURT.—That is, the assumed position.

A. Assuming this position as shown on the chart, the yellow circles indicate the distance from the same point, in nautical miles.

Q. As shown within the circle in each instance?

A. Yes, sir.

COURT.—Yes, that is what he said.

Q. I wish you would describe the portion of the river to which I now point, bounded by short dotted lines, and with various soundings, the sounding in the middle of it being 25, and the sounding at the westerly end of it, westerly side of it, 26. Describe what that represents, why that is there.

A. That represents a shoal, its contours—this dotted line is the contour, so called, contour of thirty foot depth; it encloses an area which is less than thirty feet in depth, and those figures here indicate depth as they were taken from soundings by survey parties.

Q. When were those soundings taken?

A. Taken in October, 1921.

Q. How did that shoal get there?

A. That shoal is the result, I think, of dredge, dump placed there by the dredge "Clatsop."

Q. When was that dredge dump placed there?

(Testimony of R. E. Hixon.)

A. Well it was some time prior to October, 1921. I am not sure of the date.

Q. What would be the effect of a shoal placed there in that water and in that location, as to whether it would stay there? [89]

Mr. KING.—I object.

Mr. SNOW.—The qualifications of the witness have been admitted. If they are not admitted for this purpose, I will go into it further.

Mr. McCAMANT.—We admit his qualifications to prepare the chart, but not a matter of that sort.

Mr. SNOW.—I will ask some more questions to qualify him to answer.

Q. How long have you been employed as Government engineer at Portland? A. Since 1909.

Q. Have you been all that time in the same department? A. Yes.

Q. And that is the department headed by the War Department? A. Yes, sir.

Q. Relating to channel and harbor matters?

A. Yes, sir.

Q. What has been the nature of your work during the whole of that time?

A. Well, it has been somewhat varied, starting in with taking soundings and making surveys, triangulation of the river, and on down through the various operations of dredging and construction of the jetty, and examination of the river in different places.

Q. When you speak of the river, what river do you mean? A. Columbia River.

(Testimony of R. E. Hixon.)

Q. Have you been engaged on any other river besides the Columbia and Willamette, during that period of work?

A. Well, not to any extent; some small tributary rivers for a short time.

Q. Your main operations have been the Columbia and Willamette? A. Yes, sir.

Q. Have you also studied the effect of currents on the shoals [90] and river bottoms?

A. Yes, sir.

Q. I will now ask you to answer the question which I asked you a little while ago. (Question read.) "What would be the effect of a shoal placed there in that water and in that location, as to whether it would stay there?"

Mr. McCAMANT.—I think we will renew the objection. I am not sure it is a matter of expert testimony.

COURT.—He can answer the question. I don't see what bearing it has on this case. You have a chart; you are operating under a chart made some years ago, I assume.

Mr. SNOW.—Soundings taken some three years before the collision.

A. Just this part down here.

Q. Soundings just on the lower part of the chart?

A. This line across here indicates the part which was taken from the survey of 1921.

COURT.—Is this chart the latest chart, the one navigators now use?

A. Yes, this chart itself, the whole chart, with

(Testimony of R. E. Hixon.)

the exception of that little piece there; the piece down there, was made in 1924.

COURT.—When was the chart put out, then?

A. This is it.

COURT.—I understand part of it, down where the collision occurred, was made out in 1921.

Q. Explain it, please.

A. These areas down here, the deep section of the river, are not surveyed every year. We surveyed this part where the dredging operations are carried on, improvements carried on, we surveyed that every year; and this chart, October, 1924, covers that down that far, but at that time the survey was not [91] extended down over that section of the river naturally deep; so to complete the chart to here, these soundings, this part below the line, was taken from chart of 1921.

COURT.—This chart of October, 1921, was the chart used for navigation then, I assume?

A. No, I don't think so. At that time it was—

Mr. KING.—May I make a statement which I believe will clear this matter up? When you had incorporated this portion taken from soundings of 1921, you then made up the chart you have in your hand, and issued it as the chart of the river for October, 1924?

A. Yes, sir.

COURT.—Oh, that is all right.

A. Yes. It bears this note right here.

COURT.—That is all I wanted; whether that is

(Testimony of R. E. Hixon.)

the chart the navigators used. Go ahead then and answer the question.

Q. Now answer the question as to whether or not that portion of the river which you have described as shoal, would remain, and how long it would remain?

A. Well, it would be my judgment that material would not remain there very long. It would remain there for a time, but would gradually wear away.

Q. Would it remain for a year or two, or three?

A. Might remain for a year or so.

COURT.—You don't know when the material was put in?

A. Some time prior to 1921.

COURT.—That might have been ten or fifteen years?

A. Oh, no, not that time.

COURT.—You said might have been a year or two. But unless you know when put in, the testimony would not be of any aid. [92]

A. I haven't that information at hand now.

Q. Can you get approximately the date when it was put in?

A. Be mere guess; be some time prior to 1921.

COURT.—We can't guess.

Q. I wish you would look that up; if you will, after you return to the office. Can you find that?

A. I can; may take some little time to find it.

COURT.—What is the purpose of this?

Mr. SNOW.—They are claiming that that limits the anchorage ground.

(Testimony of R. E. Hixon.)

COURT.—They were operating under a chart that showed that shoal there. Wouldn't they have the right to assume it was still there if it appeared on the chart? Would the navigator be charged with the duty of ascertaining whether washed away or not?

Mr. SNOW.—I want to show eventually none of the navigators ever saw this chart before the collision; very few have seen it since. These pilots navigate the river by their own general knowledge of the river, for the most part.

Q. Now, Mr. Hixon, to turn to the position of the "Boston Maru," I want you to describe in detail how you fixed the position of the "Boston Maru"? The one which is marked "Initial position."

A. I took the bearings which were given to me, and placed them on this chart, passing the lines through these various lights, and they do not meet at a point, which is general in a case of this kind, where bearings are taken on a magnetic compass; they do not always meet on a point because they are not exactly true. But in such cases a position is taken as being within that triangle which is known as the triangle of error.

Q. What point within the triangle did you take?

A. Generally take the intersection medium, that is, bi-sector [93] of each angle to the opposite; the bi-sector of each angle where it will intersect some point of the triangle.



(Testimony of R. E. Hixon.)

COURT.—Where did you get the data from which you made that?

A. Mr. Snow gave me the bearings.

Mr. KING.—I might explain, that long prior to this the testimony of the officers of the vessel have been taken, and these bearings were in the log-books, so they were supplied to the parties.

Q. How did you locate the direction of the head of the vessel?

A. The vessel is lying there in the direction of the current.

Q. How do you know the direction of the current at that point?

A. Why, we have taken observation at points along the river, to show the direction and strength of the current at different places, and we have such information for that point.

Q. I understood you to say that you put that—that you noted that vessel in there by direction of the current, assuming that she was hanging down on her anchor at the time the bearings were taken?

A. Yes, sir.

Q. Were the bearings given you as to direction of the head of the vessel, from the compass at that time?     A. Yes, sir.

Q. I wish you would state what that was, and describe the small chart attached to the main chart.

A. The direction of the head of the vessel as given to me was, southeast by south half south; using that direction for the direction of the ship's

(Testimony of R. E. Hixon.)

head from the compass, we put the anchor further—toward the Oregon shore.

Q. Just confine your remarks now to the initial position.

A. Well, it would not change the initial position of the ship's compass. The only position the ship's head would have, would be [94] it would throw the line to the anchor further around.

Q. How does the bearing, southeast by half south, being the bearing of the ship's head as given you, square with the current at that point?

A. Well, it doesn't square with it. The current would strike the ship on the Washington side.

Q. So if she was hanging on her anchor where the bearings were taken, the probabilities are, you would say, the bearings were wrong?

A. The ship might have been in that position temporarily, I couldn't say as to that, but if hanging dead, the anchor probably would be lying in the direction of the current.

Q. Referring again to the chart, please explain the position of the "Boston Maru" at the collision as you have noted there, and how you placed the "Boston Maru" in that position, what estimate you made.

A. I took the length of the anchor as given to me, and found the position of the anchor, the initial position, or position of the anchor.

Q. Did you allow for slack of chain?

A. Yes, I allowed on the initial position—I al-

(Testimony of R. E. Hixon.)

lowed some feet, nine feet, I think, slack in the chain in the initial position.

Q. How did you come to make that allowance?

A. Well, the chain couldn't be absolutely—wouldn't be absolutely a straight line between the anchor and the hawse-pipe; under its own weight would have some curve to it, and I estimated would be about nine feet.

Q. Now, go on if you will and describe the position of the vessel at the time of the collision, as you have placed it there.

A. Well, the position of the vessel at the time of the collision is arrived at by assuming that she would swing this way on [95] account of the wind. The direction of the wind was given to me also as being from the southeast.

Q. You were also told she swung that way, weren't you?

A. Yes, you told me she swung that way, and she was swinging around this way with the tide; she had gotten around to this point; I was told she was lying at that point and in this direction, practically across the current.

Q. You were told she was lying practically across the channel, were you not?

A. Across the current, yes.

Q. Across the current. In placing her across the current—

A. That is, the direction of the current; wouldn't be any current at the time she was lying around there, because generally—

(Testimony of R. E. Hixon.)

Q. In placing her practically across the channel, what allowance did you make for the chain from the point of the anchor, and how did you estimate the position of the stern of the "Boston Maru"?

Mr. KING.—I want to make the record clear that in that I don't want to assume this man is going to testify the length of this vessel is the channel; he says placing her practically across the channel—crosswise to the channel.

A. In placing her in this position at the collision, I shortened the chain up an additional eighteen feet, which would make it about twenty-seven feet of slack of the chain in that position.

Q. How did you arrive at that eighteen feet?

A. Just my judgment; assuming that the current was on this side, and the current on that side she would naturally go over this way until her chain was lying in that position.

Q. Describe the position at collision in the small chart attached to the main chart.

A. The only difference there is that the anchor lying in the direction of the ship's head, southeast of south, half south, [96] would be closer to the Oregon shore than shown in the large chart, by about fifty feet, fifty or fifty-five feet. I think it figures fifty-five feet; and then making the same calculation for the length of the chain and the position of the head here, would swing her stern about fifty-five feet closer to the shore there than it is here.

Q. Of course, you don't pretend to know, Mr.

(Testimony of R. E. Hixon.)

Hixon, just how much slack there would be in that chain, do you?     A. No, sir.

Q. And what you have placed on that chart is your own estimation, is it not?     A. Yes, sir.

Q. Let me ask you one or two more questions about soundings, and particularly referring to that part of the river that you described as shoal. Take the sounding 25 in the center of that portion. What does that mean, the figure 25?

A. That means that at zero stage of river at dead low water, there would be twenty-five feet of water at that point.

Q. What is the zero stage of the river?

A. That is practically as low as it gets; that is the *datum* to which we refer all our soundings; it is the low water *datum*.

Q. What was the stage of the water October, 1924, as compared with the zero stage of the river?

Mr. KING.—I ask that he be limited to the date of this collision.

Q. October 26th, as compared with the zero stage.

A. I haven't that information. The river is usually low in October; whether it was down to zero, or up above zero, I couldn't say; two feet above zero, perhaps. At high tide there would be more water than that.

Q. Referring to the range lights noted on the chart, were those range lights established by the Lighthouse Bureau—Department [97] of Commerce, is it?     A. Yes.

Q. In conjunction with your department?

(Testimony of R. E. Hixon.)

A. No, they are separate departments entirely; we co-operate a great deal. They are separate departments.

Q. They placed the lights in question?

Mr. KING.—To save any discussion we will concede the lights were established as shown on that chart.

Mr. SNOW.—I want to *show established* by authority of law.

Q. Another question. Referring again to this part which you have designated as shoal, state whether that appears in earlier blue-prints of that section of the river? A. I don't think so.

COURT.—What do you mean? You don't mean by that, that is the only blue-print that shows it, the one you have in your hand?

A. This particular shoal, yes.

COURT.—No other blue-print issued by your office shows that?

A. I don't think so; other copies of the same survey.

Q. In other words, that is the only blue-print on which it has ever appeared, to your knowledge?

A. Well, it is the only original.

Q. Only tracing? A. Yes.

Q. Mr. Hixon, are you informed, offhand, about lateness of the tides at this point, how much later they are than at Astoria?

A. Yes, the tide at that point would be about four hours and ten minutes after the tide at Astoria—later than Astoria.

(Testimony of R. E. Hixon.)

COURT.—How much would be the height of the tide there?

A. Well, it would be around four feet, your Honor.

Q. Four hours and ten minutes later. [98]

Cross-examination.

(Questions by Mr. KING.)

Mr. Hixon, have you had any experience as pilot of deep sea vessels on the Columbia River?

A. No, sir.

Q. Do you claim any knowledge as to the action of deep sea vessels swinging upon their anchors when at rest? In the river, from experience and actual operation?

A. Not from experience and actual operation, no.

Q. Now, Mr. Hixon, you said that the angle given for the ship's head in these bearings, does not correspond with the current, in that the current would throw the ship's head further out from the Oregon shore than the bearings taken by the ship's officers.

A. Throw her stern further off.

Q. When she came to rest, if you take the bearings of the ship's head as given by the officers, from the point of the compass there, it would put the bow closer to the Oregon shore than it was by your chart? A. Yes.

Q. When you made this observation did it occur to you that the same wind that you were calculating upon, in swinging this vessel toward the Oregon shore, might have caused her stern to swing a little

(Testimony of R. E. Hixon.)

bit toward the Oregon shore when she was at rest on her anchor?

A. Yes, took that into consideration. But at the time she anchored, as I got it, it was ebb tide.

Q. Yes, it was ebb tide.

A. And the ebb tide current is so much stronger than any effect the wind would have, it is negligible.

Q. And you think the wind is negligible, on ebb tide. Is it not possible that the force of the wind at the time the ship anchored might have caused her to swing sufficiently so as to [99] give the angle of the ship's head that these officers reported?

A. The wind was blowing from that side.

Q. Was blowing from the Washington side?

A. Yes. If wind, would have swung her stern—that would have thrown her stern towards the Oregon shore.

Q. Yes, and her bow off the Oregon shore?

A. Yes, sir.

Q. Which is the position you say the current would have put her in, too.

A. Yes, I put her in line with the current.

Q. Now, is there any doubt in your mind, Mr. Hixon, as to the ability of a group of officers to conjure up angles such as these, to meet at a certain point, if they desired to do so?

A. Oh, I think they could.

Q. Do you think there is anything to indicate in your examination of these angles, that they were not actually taken from on board the vessel?



(Testimony of R. E. Hixon.)

A. No, I have no doubt they were taken on board the vessel.

Q. The fact that they don't meet in one point is an indication of veracity, is it not?

A. It looks as though they had not been tampered with.

Q. In other words, assuming that these angles to these points were what is known as shadow-pin, or shadow-pin compass, do you think they represent fairly accurate readings? A. I assume they do.

Q. About as close as you can read a compass of that kind?

A. Can't get a very accurate reading with compass.

Q. Bound to be some slight discrepancy. Now, will you explain to his Honor, viewing this chart with your knowledge of the river, start at Warrior Point and give him an idea of the surface of the water and what obstructions there would be, if any, between Warrior Point and the place where the "Boston Maru" was at rest, [100] with respect to a person standing on the bridge of a vessel coming along Warrior Point there, looking down the river.

A. Well, the only thing—Warrior Point, the only thing that would be in the way, would be this dike out in front of St. Helens.

Q. What is the maximum height of those dikes?

A. Thirteen feet above low-water datum.

Q. And that is only the center of the dike, then?

A. On those regular dikes, substantially the whole

(Testimony of R. E. Hixon.)

dikes; only a hundred feet on this dike is less than that, than ten feet.

Q. Assuming a vessel has progressed up to a point—I don't know what the name of that is—a point opposite dike 27-2—would there be any obstruction in the water then that could obstruct the view with respect to the position of the "Boston Maru"? A. No, apparently not.

Q. And you have calculated the distance in nautical miles to be what at that point?

A. Two miles.

Q. Two miles at that point, that is, nautical miles; and how far off, land miles? A. About two—

Q. About two and a half?

A. No, two and a quarter about.

Q. The same view would be possibly another half mile beyond dike 27-2? A. Possibly so, yes.

Q. Have you the figures upon which you base this chart here? You said you have allowed nine feet for the slack in the chain? A. Yes.

Q. What is the distance from this line running from the bow of the vessel to point of anchor?

A. That is a hundred and fifty feet as shown on the chart.

Q. A hundred and fifty feet? A. Yes. [101]

Q. Now, as a matter of fact, were you computing that—what is the depth of the water there where she was at rest?

A. It shows forty-three feet where the anchor is.

(Testimony of R. E. Hixon.)

Q. When did you take that depth of water? Did Mr. Snow give you the figures of the height of the hawse-pipe above the water?

A. I don't believe he did.

Q. So that you got no accurate information to determine what the length of this anchor chain was—the hypotenuse of that triangle, did you?

A. No, no method that I know of by which you could make an accurate determination of it.

Q. When you put a vessel in position swinging towards the Oregon shore, what is the length of the chain shown there, measured horizontally?

A. Horizontal is one hundred thirty-two feet, I think.

Q. And the distance from the stern of the vessel, the "Boston Maru," to the dotted line which represents the thirty-foot contour, is how many feet?

A. About fifty or fifty-five feet.

Q. Can you tell how many feet beyond the thirty-foot contour you would have to go towards shore before you would reach the twenty-six-foot mark?

A. No, it would be pretty hard to say.

Q. Can you give an estimate?

A. Twenty-six foot depth?

Q. Yes.

A. Well, it might be another thirty or forty feet; something like that.

Q. Now, there will be testimony in this case, Mr. Hixon, to the effect that the "Boston Maru" was not perpendicular to the Oregon shore line at the time of the collision, but was at an angle of forty-five

(Testimony of R. E. Hixon.)

degrees from her position when she was tailing down the river. In that position how far would she extend [102] towards the Oregon shore if you dropped perpendicular from her stern to a line which ran directly to the shore? I asked you to figure that out the other day.

A. Why I though you wanted what distance she would be out, additional distance she would be out.

Q. The additional distance she would be out away than shown on your chart.

A. Forty-five degrees would be about one hundred and fifty-four feet.

Q. And assume that instead of pulling on her anchor chain and lugging on her anchor chain as you show her when she swung, she swung with the bow right over the anchor; her stern would then extend only four hundred feet towards shore, wouldn't it—if she was perpendicular to the shore?

A. Yes, if head right over the anchor.

Q. Assuming was in a position forty-five degrees, how much additional would that make?

A. That would make that one hundred and thirty-two feet additional that I have represented the chain there.

Q. I know, but if only forty-five degrees. I think your Honor gets the point I want to make. I don't want to take up too much time. If only forty-five degrees and draw a straight line parallel to the shore from where the stern was, would be further off than in a straight course?

(Testimony of R. E. Hixon.)

A. Oh, yes.

Q. About one hundred and thirty-two feet you think? A. Yes.

Q. So that in that event there would be two hundred feet of water there, thirty feet or over?

A. Yes.

Q. Now, with respect to that twenty-five foot sounding on this shoal here that has been discussed, those soundings are taken regularly up and down the river at a distance of how many feet? [103]

A. They are not taken at any specific distance apart.

Q. Well, there is no sounding between that and one end of the shoal, is there? A. No.

Q. And as you said before that was the official chart which was issued to the maritime people on the river at the time of this collision?

A. Yes, we send these charts out to anyone who wants them, and send a copy to the Coast Survey.

Q. Now, in order to clear up one statement, Mr. Hixon, which I think was made by you rather inadvertently, I will ask you—has this chart been offered.

Mr. SNOW.—I offer the chart from which he testified.

Mr. KING.—I wish to have the record show the chart offered is the one marked.

(Marked "West Keats" Exhibit 1.)

Q. Now, in order to clear the record, the chart from which you testified is "West Keats" Exhibit 1; that is right? A. One.

(Testimony of R. E. Hixon.)

Mr. KING.—I want to offer this one, for identification.

(Marked “Boston Maru” Exhibit “L,” for identification.)

Q. Mr. Hixon, I hand you “Boston Maru” Exhibit “L” for identification and will ask you to state whether or not you know that that chart is the chart or blue-print of the original chart in your offices?

A. Yes, that is a blue-print from one of our originals.

Q. When was that made?      A. October, 1921.

Q. Directing your attention to Columbia City front and rear lights, and the St. Helens Bar front and rear, I will ask you to state whether or not it shows the shoal opposite these lights?      A. Yes.

Q. Is that the same shoal which appears in chart, “West Keats” Exhibit 1?

A. It is the same shoal; it is the chart from which taken. [104]

Q. And at the time that chart “West Keats” Exhibit 1 was issued, this chart was still in force and effect, was it not?

A. Well, it was a record; no particular force and effect; it is a record there for any one who wants to see it.

Q. I mean it is issued for the benefit of mariners on the river?

A. Yes, if they want it they can have it—any of these charts.

(Testimony of R. E. Hixon.)

(Redirect Examination.)

(Questions by Mr. SNOW.)

Mr. King questioned you about a hypothetical state of facts, assuming that the "Boston Maru" swung, not directly across the river, but on a forty-five degree angle, and you gave, as I understood it, one hundred and fifty-four and one hundred and thirty-two feet? A. Yes.

Q. I don't believe I quite understood you. Did you mean to say her stern would be one fifty-four, or one thirty-two feet further from the shore or further out?

A. Further out; the first question should be one hundred fifty-four feet further out.

COURT.—You mean further out than if she were swinging at right angles?

A. Square across, yes. And the second question, he said assuming she were up on her anchor; if the anchor were not leading ahead at all, that her bow was right over the anchor, and she were still lying at forty-five degrees, what distance was that, and I said would just cut that distance in there approximately, and would hold her still further out.

Q. I can understand, the second question, you just cut off the chain, cut off the distance of the chain, assuming that her bow was where the anchor is shown on the chart; that would make her stern some thirty-two feet, approximately, further from shore, would it not? [105]

(Testimony of R. E. Hixon.)

A. That is right; if that were around on a forty-five degree angle, she would not be one hundred and thirty-two feet further out, if she was lying in here like that; in the other case she was lying over here one hundred thirty-two feet.

Q. Can't you make a diagram of that, showing these positions that I have outlined there to show your ideas. I don't think necessary to call another witness for that.

A. I should think could be put in the record without making a diagram. I am pretty busy.

Mr. McCAMANT.—We will say: Suppose Mr. Hixon, that the "Boston Maru" was lying directly athwart the channel at right angles to the current, and that instead of pulling on her anchor chain she was riding her anchor chain, and her bow was directly over the anchor, how far would her stern be from the Oregon shore, or how much difference would it make in the distance of her stern from the Oregon shore, as against the way you have placed it?

A. It would shorten that distance, move her out one hundred and thirty-two feet.

Mr. McCAMANT.—Move her stern out one hundred and thirty-two feet more?

A. Yes, sir.

Mr. McCAMANT.—Now suppose the vessel were riding her anchor, and her bow was right over her anchor, and that instead of laying athwart and at right angles to the current she was at an angle of forty-five degrees to the current, how much differ-



(Testimony of R. E. Hixon.)

ence would those two considerations make in the position of her stern with reference to the Oregon shore?

A. She would be two hundred and twenty-four feet further out.

Q. Two hundred and twenty-four feet further out than is shown by your plat here? A. Yes, sir.

A. Yes, sir. [106]

Mr. KING.—That develops the point.

COURT.—How far does your plat show her stern to be from the Oregon shore?

A. What part of the Oregon shore do you mean?

COURT.—Thirty-foot contour.

A. About fifty-five feet.

Mr. KING.—All those other figures have been with respect to the thirty-foot contour?

A. No, with respect to her position shown by the chart.

Recess until two o'clock. [107]

R. E. HIXON resumes the stand.

Redirect Examination.

(Questions by Mr. SNOW.)

Mr. Hixon, you stated that the soundings on the blue-print about which you testified this morning were the stage of the water above the zero mark. I wish you would state what stage the water at low water on October 26, 1924, was above zero?

A. One foot and a half.

Q. At Columbia City? A. Yes, sir.

Q. How high was the tide on that morning?

(Testimony of R. E. Hixon.)

What was the stage of the water at high tide?

A. High tide Columbia City would be about three and seven-tenths feet.

COURT.—At what hour?

A. At three-fourteen A. M. October 26th.

Q. Was there another figure there?

A. Yes, one of the stage at the time of the collision.

Q. Oh, yes, the stage of the water at the time of the collision?

A. About three and one-tenth above zero.

Recross-examination.

(Questions by Mr. KING.)

When you say three and seven-tenths feet for high tide at three-fourteen A. M. you mean three and seven-tenths feet above zero? A. Yes, sir.

Q. And you say at one-forty A. M. the time of this collision, be how much above zero?

A. About three and one-tenth feet.

Q. How do you arrive at those figures?

A. I arrived at those from gauge readings and records taken at the mouth of the Willamette and St. Helens and Astoria the year previous under similar conditions.

Q. On the year previous?

A. Yes, we don't have any readings taken on this particular date. [108]

A. They were at the mouth of the Willamette.

Q. Oh, I see; you took the relative ratio between the readings the previous year and applied them to

(Testimony of R. E. Hixon.)

the year 1924 at the mouth of the Willamette River; is that right?

A. Yes. We have readings for 1926 at the mouth of the Willamette; also for 1925 and 1922, years previous; we have predicated the heights at Astoria as given by the official tide tables. Under similar conditions readings were taken in 1922, 1923 at St. Helens, with the stage at the mouth of the Willamette the same as we had in 1926, which should give the same conditions at St. Helens as you have in 1926.

Q. Can you give us the hour of extreme low water at St. Helens on the night of October 25th?

A. Extreme low water?

Q. Yes.

A. Would be about eleven o'clock or eleven-fifteen, somewhere along there, P. M.

Q. Eleven or eleven-fifteen? A. Yes.

Q. How long does the tide remain comparatively stationary at the time of low water without any perceptible change in the tide? A. At low water?

Q. Yes, how long does low water exist, what you term low water; how many minutes or hours?

A. Well, in that part of the river it lasts for a considerable length of time; of course, always varies a little but the appreciable variation would require probably an hour or an hour and a half.

Q. Then an hour or an hour and a half after eleven or eleven-fifteen P. M. before have any appreciable variation?

(Testimony of R. E. Hixon.)

A. I mean both sides of low water; one-half the time ahead of it, one-half the time after it; the flood tide comes up much quicker than the low tide drops at that point. [109]

Q. You would say then that the low water would extend to about midnight before the flood tide started to rise with much rapidity?

A. Well, it would be sometime after low water, perhaps an hour after low water, before there would be any appreciable rise in the water.

Q. That is what I mean; it would carry to twelve of twelve-fifteen?

A. About midnight; somewhere along there.

Witness excused. [110]

#### TESTIMONY OF E. H. BERRY, FOR THE GOVERNMENT.

E. H. BERRY, a witness called on behalf of the "West Keats," being first duly sworn, testified as follows:

##### Direct Examination.

(Questions by Mr. SNOW.)

Captain Berry, you were the pilot on the "West Keats" on the morning of October 26, 1924, at the time of the collision with the "Boston Maru," were you not? A. Yes, sir.

Q. What is your present occupation?

A. Columbia River Pilot.

Q. Do you belong to the Columbia River Pilots Association? A. Yes, sir.

(Testimony of E. H. Berry.)

Q. How long have you belonged to that association?   A. Very near five years.

Q. When did you first get your Columbia River pilot's license?

A. That is for piloting river vessels?

Q. Yes, for piloting?   A. 1905, I believe.

Q. What licenses do you carry now, Captain?

A. Master and pilot of the Columbia River and tributaries.

Q. That is issued by the United States?

A. Yes.

Q. You also carry a State Branch License?

A. Yes.

Q. Is there any limitation as to the tonnage of vessels you can pilot under these licenses?

A. No, sir.

Q. When did you get your unlimited license from the Government first?   A. 1908.

Q. When from the State Branch?

A. 1922—no, February, 1923, I got my branch license.

Q. That is when you became a member of the association or afterwards?

A. No, I became a member a year before that.

Q. Before you got your Government Unlimited Pilot License for the [111] Columbia River, what had been your occupation, and for how long?

A. I had been a steamboat man, working on the deck, etc., for five or six years.

Q. Five or six years before that time?

A. Before I received a license.

(Testimony of E. H. Berry.)

Q. For what company or companies did you work?

A. Shaver Transportation Company.

Q. During all that time? A. Yes, very near.

Q. Did you have your first experience on the river with them? A. No, sir.

Q. Did you work for other people before you worked for them? A. Yes, sir.

Q. On the river? A. Yes, sir.

Q. For whom?

A. I have worked for the Oregon City Transportation Company; I worked on the old Toledo that ran up the Yamhill in 1896. I worked—well, then I think the next was the Shaver Transportation Company.

Q. How old are you now, Captain? A. Sir?

Q. How old are you now? A. Forty-eight.

Q. For what length of time have you been employed on and connected with the Columbia River?

A. Thirty years.

Q. Now, in what capacity have you worked on the Columbia River during that thirty years?

A. Worked as deck-hand, mate and pilot and master.

Q. Of what vessels were you master?

A. Master of the Shaver Transportation Company's boats.

Q. And that was the period, you say, immediately before you became an Association Pilot?

A. Yes, sir.

(Testimony of E. H. Berry.)

Q. On the night of October 25, 1924, what time did you go on board the "West Keats"?

A. About ten o'clock, I believe. [112]

Q. Where was the vessel at that time?

A. Terminal four, pier one.

Q. St. Johns? A. Yes, sir.

Q. Do you remember approximately the time you left that terminal and started down the river?

A. Why it was about ten minutes to eleven, I believe, as near as I remember.

Q. What kind of a night was it with regard to weather and visibility—darkness?

A. Very dark night; clouds, but lights were visible.

Q. Was it foggy? A. No, sir.

Q. Clear?

A. Well, the visibility was clear, that is, you could see; of course it was cloudy; very dark, but you could see lights; it was not foggy.

Q. Could you see dark objects, such as the bank of the river well?

A. No, sir, you couldn't see the shore line at all.

Q. You took your place on the bridge of the "West Keats," did you, when she left the terminal?

A. Yes.

Q. Now, at what speed did the vessel proceed down the Willamette River?

A. I would say about—I would say between five and six knots, down the Willamette River. I am just not sure whether I ran full speed down the Willamette or not. I hardly think I did. Ordi-

(Testimony of E. H. Berry.)

narily it is customary on dark nights to run at moderate speed until you get into the Columbia. I believe I did.

Q. Before you went full speed; how was the vessel loaded? A. Fully loaded.

Q. Full cargo was it; how did she steer?

A. She steered very well.

Q. When you came into the Columbia River, at what speed did you go?

A. Well, going down the Columbia River? [113]

Q. Yes. A. Well, I would say—

Q. I don't mean the number of knots per hour; I mean what bell. A. Full speed.

Q. Full speed ahead; now who was on the bridge with you and in the pilot-house during that period, between the time you came into the Columbia River, and the time of the collision?

A. The quartermaster at the wheel, and the second mate.

Q. The quartermaster of course was at the wheel in the pilot-house? A. Yes, sir.

Q. Where did the second mate stay?

A. In the pilot-house I believe most of the time.

Q. Where is the telegraph of the "West Keats"?

A. In the pilot-house.

Q. Who gave any signals that were given to the engine-room?

A. The second mate operated the telegraph.

Q. At whose orders? A. The pilot.

Q. And will you locate the telegraph on the "West Keats"—I believe I asked you that question.



(Testimony of E. H. Berry.)

I will repeat it to make sure: Where was the telegraph located on the "West Keats"?

A. In the pilothouse.

Q. Who gave the orders to the man at the wheel, the quartermaster?      A. The pilot.

Q. You yourself?      A. Yes, sir.

Q. State whether he obeyed those orders promptly and correctly?

A. Yes, he obeyed them promptly and correctly?

Q. State whether the vessel answered her helm during that voyage down the Columbia River before the accident?

A. She answered her helm very well.

Q. I will now hand you a chart marked "West Keats" Exhibit 1, and call your attention to the point above the place of collision and about opposite the town of St. Helens; at what speed were you [114] proceeding when you reached that point—made the turn indicated there on the chart, as to whether you were on a full speed bell?

A. Full speed, sir.

Q. What channel did you go down there, the channel alongside St. Helens?

COURT.—Excuse me; haven't you a chart that isn't marked. If you have a chart without all these figures on I think the captain should use that, not one that someone else has marked for him.

Mr. SNOW.—I don't think it makes any difference, your Honor. I just as soon have him testify without any chart at all.

COURT.—He should have a clean chart in this

(Testimony of E. H. Berry.)

case. I should like to have these people tell what their ideas are, without marks made on the chart by somebody else.

Mr. McCAMANT.—This chart of ours has but one mark on it; it is the identical blue-print, but there are some marks down about the place of the collision.

COURT.—I don't think it makes much difference.

Q. Now, Captain Berry, there are two channels down on the chart apparently, one extending right in front of and immediately off the town of St. Helens, one across the river. Which channel did you follow down?

A. The main ship channel across the river.

Q. On the Washington side? A. Yes, sir.

COURT.—On the Washington side?

A. Yes, sir.

Q. When you made the turn at the upper end of St. Helens jetty, describe what if any lights were in view, that is after you started down the jetty.

A. Well, I saw the lights on the jetty, Columbia City Range ahead of me, and also the lights of Columbia City, in the town. [115]

Q. How many lights were there in view around Columbia—around the town of Columbia City and around the ranges?

A. Oh, might have been a couple of dozen.

Q. On which range were you, if any?

A. On St. Helens Bar range.

Q. Now, Captain, I wish you would describe a range on the Columbia River and state what it looks

(Testimony of E. H. Berry.)

like, and how it operates. How do you use it, for example, as an aid to navigation?

A. A range consists of two lights; the front light would be very much lower than the rear one; the rear one would be higher and maybe from two hundred and fifty to five hundred feet to the rear of the front light, and to make a range you keep these lights on; the reason one is higher than the other, that is what forms the range; if they were the same height it would not be a range.

Q. One would obstruct the other?

A. One would obstruct the other.

Q. Are these range lights normally red or white or any other color?

A. Well, they are different, different ranges; some are both white; some are both red; some are red and white.

Q. If you are proceeding on a range so that one light is immediately above the other, what does that convey to your mind as to whether you are on or off the range?

A. You would be on the range if one light was above the other, that is in line.

Q. If the lower light was to the right of upper light, which side of the range would you be on?

A. You would be on the left-hand side; if the front light was to the right of the rear light, you would have it open on the left side. [116]

Q. As you proceeded down past Columbia City did you actually go on and follow the St. Helens Bar range lights? A. Yes, kept them right on.

(Testimony of E. H. Berry.)

Q. Were you on the range?      A. Yes.

Q. Now, state as near as you can where you were when you first made out the lights of the "Boston Maru" to be the lights of a vessel at anchor.

A. How far was I away?

Q. And where were you?

A. I was about middle way on this St. Helens Bar Range; in other words, about to the red light on the end of the breakwater—about there I would say.

COURT.—Show me that on the chart, Captain.

A. Now, here is the range; this is St. Helens Bar range right up along here; this is the breakwater runs down along here; this is the red light on the lower end of the breakwater. I came from this direction way off here; here is the range light here; I had to come down and get right on to this range light—this range light here, and I will say I was along about—

COURT.—When you first made out?

A. Yes.

COURT.—Along about here when you first made out the lights of some vessel at anchor?

A. Yes, right about in here as near as I can remember.

Mr. KING.—I was going to suggest the light could be identified as right opposite from No. 28-2; is that about where it was?

A. Well, it is a fixed light here.

COURT.—You were about opposite here?

(Testimony of E. H. Berry.)

A. Yes, as near as I can remember, right about opposite.

Mr. KING.—Will you put a red mark there.

A. This is a red light. [117]

Mr. SNOW.—Does your Honor want it marked on the chart?

COURT.—Yes, just mark where your vessel was at the time.

A. I say was right in here, sir.

Mr. SNOW.—Witness makes a red mark at approximately the place.

COURT.—Write it on the chart there. “When first saw the vessel at anchor.”

A. ‘West Keats’ at the time of first seeing anchored vessel.”

Q. You have written on the chart, have you not, Captain, “‘West Keats’ at time of first seeing anchored vessel”?

A. Yes.

Q. And that is a red mark you have made on the chart?

A. Yes.

Q. I understood you so, or the question I asked you called for this answer at any rate: Was that the first time you may have seen these anchor lights of the “Boston Maru,” or the first time you made them out to be anchor lights of a vessel at anchor?

A. That is the first time I made them out to be a vessel at anchor. If I had noticed them before, I perhaps did not think much about it at the time, a few lights down in that direction.

Q. In your experience piloting on the Columbia

(Testimony of E. H. Berry.)

River, have you passed vessels at anchor in that general locality before this time?

A. Yes, a good many times.

Q. I wish you would state whether or not there is an anchorage ground recognized by the custom of pilots at that point?

Mr. KING.—I object to that as calling more or less for a conclusion. That is the point at issue in this case. I would like to have him tell the facts about it, and let the Court draw the conclusion.

COURT.—Yes.

Q. I withdraw the question, then; state whether or not there are vessels anchored in that general locality from time to time by the [118] pilots?

A. Yes, sir.

Q. Now, have you anchored vessels there yourself? A. Yes, sir.

Q. How do you anchor vessels at a point generally opposite the Columbia City range lights at night?

A. I use the lower Columbia City range light; put that abeam out about twelve hundred feet or perhaps a little more; and at that time there was a red range that we anchored our vessels on, which would be the lower light of the St. Helens jetty, and a red light on another little jetty that came out just a little above the St. Helens jetty, on a dolphin.

Q. You speak of that as a red range? A. Yes.

Q. By that, do you mean was two red lights?

A. Yes, those was two red lights; it wasn't put there for a range, however, but we usually use that for a range to tell us where we were at nights.

(Testimony of E. H. Berry.)

Q. Were those fixed red lights? A. Yes, sir.

Q. Now, referring to "West Keats" Exhibit 1, can you point out those two lights?

A. I have just mentioned?

Q. The two lights you have just mentioned.

A. Yes, here is one of those lights right here, on the end of the breakwater. The other one is here on the end of this little breakwater that comes out from the Washington shore.

Q. What does this little breakwater, the second one, numbered on the chart—

A. That is 27-2. [119]

Q. And what is the Columbia River breakwater numbered on the chart? A. 28-2.

Q. That light takes you approximately how far out from the shore line of Columbia City?

A. A good 1,200 feet.

Q. What can you say as to the practices of other pilots anchoring vessels in that locality?

A. I would say they also do the same. I have come up many a time and found them anchored there. I could see they were there, because I could see this range, see the vessel anchored there.

Q. When you first made out the anchor lights of the "Boston Maru" to be the lights of a vessel at anchor, state what was your judgment at that time as to the location of that vessel?

A. I supposed she was over on this certified anchorage.

Mr. KING.—What was that last answer?

A. I supposed her to be over in this regular an-

(Testimony of E. H. Berry.)

chorage ground, where vessels are commonly anchored for taking on cargo from the water.

Q. Now, in piloting vessels down in that particular section of the river, state what is your practice as regards the use of St. Helens Bar range and Columbia City range? Is that question clear, Captain? A. I don't know as I just—

Q. In piloting vessels down in that particular section of the river how do you use these aids to navigation that are described on the chart as the Columba City range and the St. Helens Bar?

A. Come down on the St. Helens Bar Range, and turn to the right down to the Oregon shore at a reasonably safe distance from shore; keep on that course until you get the Columbia City range on; that takes you then on down the river towards Martin Island. [120]

Q. You pick up the Columbia City range astern generally? A. Yes, always.

Q. Approximately how far is it from the place where you ordinarily leave the St. Helens Bar range to the place where you ordinarily pick up the Columbia City range?

A. Well, about half a mile, if I remember right. I never measured it; I am making a guess.

COURT.—Captain, where is the St. Helens Bar range you refer to?

A. Right here is Columbia City.

COURT.—No, the St. Helens Bar Range you have been referring to?

A. It is right down here, sir.



(Testimony of E. H. Berry.)

COURT.—Where is it?

A. At Columbia City, Oregon.

COURT.—Counsel asked you about the lights on the St. Helens Bar range; where are they?

A. They are at Columbia City.

COURT.—I know that is Columbia City, but counsel has been referred to St. Helens Bar Range.

A. This is called St. Helens Bar Range.

COURT.—Are there range lights there?

A. Just as I said, I am right down here on this range.

COURT.—But lights are in all up and down the river; there are lights; is there a light up here any place?

A. Yes, a red, at this dike, a white on this jetty here. A red light here; we passed this red light on our starboard side heading right for this.

Q. I don't think that you have Judge Bean's idea; I believe the Court wanted you to locate on the map the two lights representing the— [121]

COURT.—You referred in your question, to the St. Helens Bar Range; I didn't know what he meant by that.

Q. Locate the two lights making up the range line of St. Helen's Bar Range.

Q. Here is the front red light, a red one; here is the rear one, white; takes you right up along what you call the St. Helens Bar.

COURT.—Those are the range lights for St. Helens Bar down there?

(Testimony of E. H. Berry.)

A. Yes, coming down the river you head for them, and going up the river you put them on your stern.

Q. When coming down the river by that range, you could see those two lights, could you?

A. Yes.

Q. Which one was the higher of the two?

A. The rear is the higher one.

Q. That is always the case in range lights, is it?

A. Yes, sir.

Q. When you made out the lights of the "Boston Maru" as you have described, from your place on the St. Helens Bar Range as you have described, what, if any, decision, did you come to relative to the manner of taking the vessel down past that vessel at anchor?

A. I supposed that I was going down on the Oregon side of this channel, this vessel.

Q. Did you feel that it would be necessary for you to alter your customary way of running that portion of the river in order to pass the "Boston Maru"? A. No, sir, not at that time.

Mr. McCAMANT.—That is irrelevant, I think; the statute requires him to do a certain thing. What was customary—what he had been accustomed to doing, and whether he thought it [122] necessary to vary his custom would be immaterial. The witness may say with propriety what he intended to do.

COURT.—Go ahead.

Q. How, then, did you intend to take your vessel past the anchored "Boston Maru"?

(Testimony of E. H. Berry.)

A. I intended to take her past on the Oregon side.

Q. Now, we have left you, Captain, at a point which you marked with a red mark on the chart, opposite the lower end of St. Helens jetty. What did you do next in the navigation of the "West Keats"?

A. I kept her on the range until I got down to the turning point, when I should have turned along the Oregon shore.

Q. Can you locate that turning point on the map, and mark with a red mark, with a red cross; mark your cross on the range line, Captain.

A. Well, that would be right about here, "turning point."

COURT.—That was half a mile from the point of collision.

Q. About half a mile from the place of collision, Captain?     A. Yes, sir.

Q. What order did you give at that time, if any order, to make that turn?

A. Port a bit, the order I gave the quartermaster.

Q. Was that order obeyed?     A. Yes, sir.

Q. Did the vessel answer.     A. Yes, sir.

Q. And what was the next order you gave?

A. I believe it was, "Steady!"

Q. What was the reason for giving the steady order?

A. Well, I had brought her on her course, and however ordinarily before we give the steady, though, we usually tell them to ease [123] the

(Testimony of E. H. Berry.)

wheel; that gives them a chance to sort of ease the ship about up, because if you give steady, after swinging, all of a sudden, one order, they ordinarily can't steady the vessel right away, and she might run by her course.

Q. When you arrived at the turning point, Captain, the place you marked as turning point, state what was your then opinion as to passing the "Boston Maru" to the Oregon side, as you had intended?

A. As I made my turn down the Oregon shore, I expected to pass the "Boston Maru" on the Oregon side, but in maybe getting a little further down I could see that she was perhaps pretty close to the Oregon shore.

Q. Was that at the time of making your turn by the St. Helens range, or afterwards?

A. After. I had made my turn expecting everything was all right.

Q. Did you give any order as you observed that she was in pretty close—that the "Boston Maru" was in pretty close—to the man at the wheel?

A. As a navigating officer?

Q. Yes, as a navigating officer of the "West Keats." A. Well—

Q. In other words, Captain, what was the next order you gave after you gave the steady order that you have described? A. I gave starboard a bit.

Q. What was the purpose of giving that order?

A. Because I saw that the "Boston Maru" was too close to the Oregon shore; that I would have to

(Testimony of E. H. Berry.)

go over a little closer to the shore in order to pass her.

Q. And did the vessel answer her starboard helm? First, let me ask you, Captain, was the helm put to starboard? A. Yes, sir. [124]

Q. Did the vessel answer?

A. Well, as I proceeded closer to the "Boston Maru" the ship didn't answer the starboard helm.

Q. Did you give another order then?

A. Well, I finally gave hard astarboard.

Q. Was the helm put hard astarboard? A. Yes.

Q. Did the vessel answer that helm?

A. No, she did not.

Q. Now, describe, Captain, why she didn't answer the starboard helm and hard astarboard helm.

A. Proceeding down along the shore, as I was going quite close to the "Boston Maru" in order to get by safely, I would have to go very close to the shore, and a ship coming along quite a good rate of speed close to shore, her stern will suck to this shore, consequently her head will go out, out to starboard; her stern set to the shore which would be her port side, and her bow would go out to starboard, and I had her—I put her full astarboard or hard astarboard to keep her head in—keep clear of the "Boston Maru," if I could.

Q. What was the next order that you gave after the hard astarboard?

A. I believe it was stop, sir; stop the engines.

Q. How long was that stop order given before the collision? A. About a minute.

(Testimony of E. H. Berry.)

Q. Did you take the time—did you personally take the times of any of these orders or the time of the collision? A. No, sir, I did not.

Q. Did anybody else take them?

A. Well, now, it was dark; I couldn't see; of course I suppose they did; that is their business; a mate on watch to look after those things.

Q. What was the first order you gave after the collision, then? A. Full astern. [125]

Q. What was the position of the helm at the time of the collision? A. Hard astarboard.

Q. Had any change been made in the helm from the time you gave the hard astarboard up to the time of the collision? A. No, sir.

Q. What is the shortest distance, Captain, before the collision—let me ask another question first: Did you see the "Boston Maru" itself at any time?

A. No, sir, couldn't see the hull; only the lights.

Q. Could you tell from the lights whether she was lying across channel or diagonally or some other way? A. Yes, I could tell by the lights.

Q. How was she lying?

A. Across the channel; very near straight across.

Q. Could you tell whether her stern or bow was nearest the Oregon shore from the lights?

A. Yes.

Q. How did you tell that?

A. The front anchor light on a ship is higher than the one at the stern when they are at anchor. The low light was to the Oregon shore.

Q. That is to make them act as a range?

(Testimony of E. H. Berry.)

A. Yes.

Q. Now, what is the shortest distance to the "Boston Maru," at the place of collision, that you feel you could safely have made a turn to pass the "Boston Maru" on the Washington side?

A. Well, after I had turned down the Oregon shore and could see where the "Boston Maru" was, I was too close to her to turn at that time, and before I had arrived at this place I wouldn't have any idea that it was necessary to turn for the Washington shore.

Q. Does the "West Keats" steer better with her engines going full speed ahead, or half ahead or any other way?

A. She will steer harder full speed ahead, for instance, her [126] stern is sucking to shore; you want to get all of the turns of the propeller, get the water against that rudder all you can in order, if possible, to counteract the stern going to shore.

Q. Setting aside the location of the shore, and assuming you are out in midstream, at what speed does she steer best and quickest?

A. Ordinarily, traveling along channels you mean?

Q. In midstream, without considering the suction of the shore, at what speed does the "West Keats" steer best?

A. Why I would say full speed; steers nicely at full speed.

Q. You have piloted other vessels of that class, have you?      A. Yes, sir.

(Testimony of E. H. Berry.)

Q. Is that deduction based on that experience?

A. Yes, sir.

Q. Referring to the orders which you gave the man at the wheel which, as you will recall, were first port a little, then steady, then starboard and hard astarboard, all preceding the stop order, were the times taken of these orders?

A. No, sir, I think—I don't think they were; they hardly ever take time of orders that are given to the quartermaster, as to steering.

Q. It is customary, isn't it, to take the time that the order is given to the engine-room?

A. Yes, sir.

Q. But not the orders given the quartermaster?

A. No, sir, not ordinarily—if they were taken—of course they may have taken them for all I know, but I know nothing about it; it is not customary.

Q. Can you give a general idea how long before the stop order, the starboard and hard astarboard orders were given? I realize it is hard for you to state that accurately, Captain; you were thinking about other things than the length of time [127] that elapsed, but can you give the Court an estimate of it?

A. From the time the starboard a little and the hard astarboard order was given?

Q. Approximately the time elapsing between these orders and the stop order, which was given a minute before the collision.

COURT.—Which do you mean, the first order or the last one?



(Testimony of E. H. Berry.)

Q. Well, were two given close together, Captain?

A. Yes, they were given quite close together; starboard a bit and hard astarboard were given quite close together.

Q. Well, can you give an idea as to how long they were before that stop order?

A. Well, I don't know; maybe three or four minutes; something like that.

COURT.—How much?

A. Three or four minutes.

COURT.—Do you think it was as long as that, Captain.

A. Well, no; no, it wouldn't—but it might have been a couple of minutes; about two minutes.

COURT.—A couple of minutes after the hard astarboard order before the stop order was given?

A. I hadn't thought of that; followed quite closely.

Q. Now, can you give a rough estimate of the length of time elapsing between the steady order and the hard astarboard order—the steady order and the starboard a little bit? You remember the first order you described was port a little, then steady, then starboard, then hard astarboard. Can you give an estimate of the length of time elapsing between the order "Steady" and the order "Starboard a little"?

A. Well, it might have been a minute or so; might have been a minute and a half; somewhere around there.

Q. Could you see the loom of the bank on the Ore-

(Testimony of E. H. Berry.)

gon side about [128] the time of the collision, about the time you were approaching the "Boston Maru"?

A. No, sir, you couldn't make out the shore to speak of at all. It was a dark bank along there, which looked very close, but you couldn't discern any trees or anything like that.

Q. You say you could see the bank?

A. Well, you could see a dark line along there.

Q. How far was that from the "Boston Maru," or from the "West Keats," in your estimation?

A. Oh, about perhaps one hundred and fifty feet. I should judge about that; of course it is very hard to tell exactly.

Q. When was it that you realized there was going to be a collision, or did you so realize before the time of the impact?

A. No, was just a few seconds before the collision that I was sure there was going to be one.

Q. Now, I think you testified that after the collision you gave orders to stop—the order to full speed astern one minute after the collision?

A. Yes, sir.

Q. What was the reason for that order?

A. I wanted to turn my ship around; come back up.

Q. And stand by?      A. Stand by.

Q. And did you do that?      A. Yes, sir.

Q. Did any other vessel pass you as you turned around?      A. Yes, sir.

(Testimony of E. H. Berry.)

Q. Did you exchange signals with such other vessel? A. Yes, sir. I did.

Q. Where did they pass you?

A. She passed out to the port; the Washington side.

Q. Who gave the first signal to pass out to the port? A. I did.

Q. When was that that you exchanged those signals? [129]

A. Just shortly after the full astern bell when my ship had started to swing around.

Q. Now, Captain, I wish you would describe how you ordinarily stop a vessel of the size of the "West Keats," and loaded as the "West Keats" was; how long you take and what orders you give in order to do it.

A. If I were proceeding down the river at full speed, a good mile or a mile and a half or maybe two miles, I would give a half speed bell.

Q. Maybe two miles before the place where you wanted to stop? A. Yes, sir.

Q. All right; go ahead.

A. I would give a half speed bell; I would let her run on that for awhile, and would give a slow bell; let that speed run off a little, and give her a stop bell; let her run along, headway pretty well off, then I would give her perhaps full speed astern; if the ship was swinging too fast for me, I would perhaps put her hard astarboard, give her half to full ahead, if I wanted to—that would be to straighten her up; if the case was she was swinging too fast

(Testimony of E. H. Berry.)

for me; ordinary places in the river if you would start to back a ship up without keeping them straight they would—if her headway was off she would swing to port, and go into the bank somewhere.

Q. If the engines of a ship like the “West Keats” are put full speed astern, what is the effect on the steering of the vessel, the way in which she may turn or continue in her course?

A. Very quickly her bow turns to starboard and stern to port, and if a person didn't have four or five miles to go, they would run aground; if you put her engines full speed astern, if she was working full ahead. [130]

Q. If you had put the engines full speed astern shortly before the collision, what would have happened; what might have happened?

A. Just about cut the “Boston Maru” in two in the center.

Q. Did you speak the “Boston Maru,” or turn around and come back after the collision?

A. Yes, sir.

Q. What conversation took place?

A. I asked them the name of the ship, if they were badly damaged, or particularly below the water line and they immediately—needed immediate help.

Q. What did they answer?     A. Said no.

Q. Where did you proceed then?     A. Portland.

(Testimony of E. H. Berry.)

Cross-examination.

(Questions by Mr. KING.)

Did you have your field-glasses with you when you boarded the "West Keats"?

A. No, I didn't have mine.

Q. You had some on the ship there, did you?

A. Yes, there usually are. Usually all ships carry them.

Q. You didn't use field-glasses on these lights when you observed them? A. No, I did not.

Q. Now, when you reached this range where you say you made out the lights of the "Boston Maru" as a vessel at anchor, which you marked on the chart there approximately opposite that dike, No. 28-2, did you then observe the position of the lights of the "Boston Maru"?

A. I knew there was a vessel anchored there; I had no fear however, at that time, that there might anything occur.

Q. Well, I understand that. You knew of course that her stern was towards the Oregon shore from the position of the lights? A. Yes, sir. [131]

Q. In other words, the lower anchor light was nearer the Oregon shore than the higher forward light; is that right? A. Yes, sir.

Q. Now, what was the state of the tide at the time you observed these lights? A. I beg pardon.

Q. What was the state of the tide when you were out on the range where you said you made out these anchor lights? A. Starting to flood.

Q. You knew that, of course? A. I did.

(Testimony of E. H. Berry.)

Q. You knew it at the time?

A. I knew it at the time, yes. That is the only way I would have of finding out.

Q. It is part of your duty to keep track of the tides every day?

A. Oh, yes; yes, sir, we always do it.

Q. What was the condition of the wind?

A. Very little wind; it was not noticeable as I remember it.

Q. You say that prior to the time and during the time you had been acting as pilot on the Columbia River, which was approximately two years—was it—prior to this collision?

A. No, I had been pilot about three years before that.

Q. Almost three years?     A. Yes, sir.

Q. You say during that time you had anchored vessels in this portion of the river?     A. Yes, sir.

Q. Where the "Boston Maru" was?

A. Yes, sir.

Q. Why did you anchor them there?

A. Some to take timber; others coming up the river to anchor there for the night perhaps.

Q. And did you observe the effect of the tide on these vessels while they were riding there at anchor?

A. Yes, sir.

Q. What did they do?

A. I anchored one there five hundred feet long, and she turned [132] towards the Oregon shore; Captain Pierson went by with another ship, and I asked him the next time I saw him, "Did you have

(Testimony of E. H. Berry.)

plenty of room?" "Yes, sir." That was a five hundred and twenty-five foot ship.

Q. When you were at this point where you first made out the anchor lights of the "Boston Maru," which you marked on "West Keats" Exhibit 1, did you know how long this vessel was that was then at anchor?

A. That I didn't know. I didn't know what vessel it was.

Q. How long did you assume her to be?

A. Well, vessels range from different lengths; all vessels over two hundred and fifty feet carry two anchor lights.

Q. She might have been a vessel just two hundred and fifty feet long; is that right?

A. She might have been, but ordinarily you can tell by the distance the range lights are apart; get some idea of course.

Q. How long did you assume her to be?

A. Well, I didn't think about that. Didn't come to my mind.

Q. You didn't think about that?

A. No, it stood me in hand to keep clear of her, if I could.

Q. Did you know when you were at that point how much anchor chain she had out?

A. No, no, no.

Q. How much did you assume she had out?

A. I usually put out about thirty fathoms there, unless heavy current in the river; ordinary anchor, however, in good water thirty fathoms.

(Testimony of E. H. Berry.)

Q. You assumed she had out thirty fathoms; is that right?     A. That is right.

Q. What is the fact about when a vessel is at anchor, and practically no wind, and tide is flooding, how does she turn, if she turns with the tide? [133]

A. Well, as I say, I anchored on there that turned to the Oregon shore.

Q. Where did her bow remain? Where was she when turning?

A. Well, if there is any wind they will stretch the chain out more than they will otherwise.

Q. Now assuming there was such wind as existed on the morning of October 26th?

A. Well, I just don't remember about the wind that morning. I didn't notice it—however.

Q. Didn't I understand you to say just a moment ago that the wind was negligible that morning at the time of the collision?     A. Not noticeable, I said.

Q. Assume that the wind was not noticeable but was flooding tide, what is the fact as to how the ship will move when she turns with the tide?

A. Well, she will take some chain; she won't ride right up over her anchor and stay right over it, I don't think.

Q. Assuming that she has out a hundred and eighty feet of chain in approximately forty feet of water, how much will her bow ride off towards the Oregon shore from her anchor?

A. Well, I don't know. I don't believe I could answer that. I don't know that I know that.

Q. You had no opinion on that point at the time



(Testimony of E. H. Berry.)

you made out the anchor lights on the "Boston Maru"?

A. It wasn't necessary for me to know that. If she had the whole business stretched out would have been room enough for me on the Oregon side.

Q. If was anchored where you say she should have been?

A. She ought to have been, yes.

Q. You assume that knowing she was anchored where you say she should have been? [134]

A. I assumed that when I saw her up there, just before I made the turn.

Q. You blew no whistles prior to the actual time of the collision, did you, Captain? A. No, sir.

Q. And as I understand it, it was only a few minutes before the actual collision that you knew there was going to be one?

A. It wasn't very long before.

Q. Just a few seconds?

A. It wasn't very long before, you know.

Q. Now, going back, after the collision, you passed on the Washington side of the "Boston Maru"?

A. Yes, I had to; I couldn't get back on the other side.

Q. But the fact is you did pass on the Washington side? A. When I came back?

Q. Yes, and you didn't experience any difficulty in doing so, did you?

A. Oh, no, no, no, sir; there was a mile of room.

Q. Plenty of room over there, wasn't there?

(Testimony of E. H. Berry.)

A. Yes, sir.

Q. In other words, Captain, if at the time you made out the lights of the "Boston Maru," when you were up there at the point you marked on the chart, "West Keats" Exhibit 1, if you had known at that time the position of the "Boston Maru," you could have safely passed on the Washington side, couldn't you?

A. Yes, if had been daylight would have been no difficulty, because I would have known where she was.

Q. And how soon after you went on down by the "Boston Maru"—how soon after the collision did you come back up alongside of her, and speak to her?

A. Two or three minutes; wasn't long turning around.

Q. You were not very long turning around?

A. No.

Q. You think was just a few minutes you were back up there? [135]

A. Yes, three minutes perhaps, three and a half, I am just guessing.

Q. After the collision? A. Yes.

Q. After you spoke to him then, you proceeded on up towards Portland? A. Yes, sir.

Q. Now, coming down after the collision you didn't touch the Oregon shore, did you, you didn't go aground?

A. No, didn't go aground; sucked very hard.

Q. You sucked very hard?

(Testimony of E. H. Berry.)

A. Couldn't feel the ship touch; however, must have been close.

Q. In other words, as I understand you, Captain, the "Boston Maru" was anchored up opposite the upper lights, and not far enough out. Is that right? A. Yes.

Q. Now, in assuming that she was anchored further out, did you have in mind this shoal that was opposite those lights? A. Sir?

Q. In assuming that she should have anchored out twelve hundred feet, as you say, did you have in mind this shoal shown on this chart opposite these lights?

A. No, sir, I didn't know that shoal was there.

Q. You didn't know it?

A. No, sir, it had not been shown up to that time; no one knew it that I know of; been ships drawing thirty feet anchored there right along.

Q. But it was shown by the chart put out in October, 1924, wasn't it?

A. Yes, this is it. I have it here. But this happened, of course, in October, 1924. I don't know that that chart had come to our office at that time.

Q. You get these charts ordinarily, don't you, when put out, your office down here? [136]

A. Yes, we get them.

Q. These are the charts that you rely upon in navigating the river? A. Yes, sir.

Q. You don't make any individual soundings of your own?

A. Well, we do occasionally, along the docks, etc.

(Testimony of E. H. Berry.)

Q. Yes. But as I understand, for the purpose of navigating up and down this channel you accept the soundings shown on that chart?

A. Oh, yes; yes, sir.

Q. Now, you say it would take two miles to stop the "West Keats" under ordinary conditions. Is that right?

A. I said that under ordinary conditions I would perhaps stop her two miles, maybe a mile and a half; depends; there was a bend in the river here; you have to take more precaution where you are going on a bend or curve in the river, than you would straightaway; your ship would be more manageable on straightaway.

Q. Suppose you had thrown the "West Keats" into full speed astern at the point where you mark the turn, shown on chart "West Keats" Exhibit 1. What would have been the effect on the bow of the "West Keats," as to which direction it would have turned? A. Off to starboard.

Q. That would throw her bow over towards the Washington shore, would it not? A. Yes.

Q. If you had taken that course at the point marked turning point on that chart, it should then have been able to have cleared?

A. I wouldn't have been able to manage my ship or handle her at all; no pilot would ever put her full astern there; no matter if two ships anchored there.

Q. I didn't hear the answer.

A. I say, no pilot would have put her full astern at that place under any consideration. I suppose if

(Testimony of E. H. Berry.)

a man—something loomed right up in front of you, the first impulse would be, perhaps, to [137] put her full astern, but under those conditions wasn't called for at all.

Q. Now, in order that we may understand each other, Captain, you say that it was impossible, if you had realized at the point you have marked, "Turning point" on "West Keats" Exhibit 1,—you say that it would be impossible for a pilot then, realizing the position of the "Boston Maru," to have passed her on the Washington side?

A. I do; I think so, that is, under the conditions.

Q. You think—

A. If it is daylight and something like that, and you were figuring or judging this; at the time I had any idea that I had to pass on the Washington side, it was too late to get there under any safe consideration.

Q. That is you were considerably past this point you have marked "Turning Point" before you had any idea you should go on the other side, were you?

A. Yes, sir, I was.

Q. How far past that, how many thousand feet?

A. Well, it might be—it might be a thousand or fifteen hundred feet; I hadn't thought of that just in that way before; some little time; I had to finish out this course, however, and turn down toward the Oregon shore before I knew there was any danger at all.

Q. You don't wish the Court to understand that you couldn't navigate on the Washington side of

(Testimony of E. H. Berry.)

the channel if you desired to take the vessel down there, do you?

A. Well, the position I was in, I couldn't operate that.

Q. Not at that time. Just forget about the situation at that time, forget that now. I will ask you, could you take a vessel down the Washington side of this channel if you so desired? [138]

A. Well, it wouldn't be very safe here the "Boston Maru" was, because above her—right out from the Columbia City upper, it was at that time shoal, you couldn't cut out there quick, you would have to run down before the "Boston Maru" quite a bit, and it would be unsafe especially in the night; I took it to be that way, however.

Q. I wish you would point out to the Court where this shoal is that you say would make it unsafe to turn out to take the Washington side?

A. This is all shoal here in front of Columbia City, up above here, you see there is eleven feet there; seventeen feet there; if coming down here and put my ship full astern, or something like that, will go right off out here and stick here.

Q. Suppose at this point on "West Keats" Exhibit I marked "Turning Point," you had not put your ship astern, but had simply set her hard aport, couldn't you then have passed the "Boston Maru" on the Washington side?

A. Well, it might be that you could; I don't think I would attempt it; I wouldn't say that—

Q. You wouldn't say, or you would say?

(Testimony of E. H. Berry.)

A. I wouldn't attempt it.

Q. How much further up the St. Helens bar range would you have to be before you would be able to attempt it?

A. You couldn't attempt it until you came down here to where this turning place was; you wouldn't attempt to go on the Washington side of the "Boston Maru" way up here; you have to come right down here where I was, before you could attempt it.

Q. Now, if we understand you correctly, Captain, you say you couldn't attempt it before you got to the turning point marked on "West Keats" Exhibit 1, and you couldn't attempt it after that. [139] Now, how would it ever be possible to navigate on the Washington side of the "Boston Maru"?

A. If wasn't a ship anchored crosswise down there you could perhaps go over there.

Q. What is the reason you couldn't do that in this case? Isn't there plenty of water over there? Wouldn't there be six or eight hundred feet of water on the Washington side of the "Boston Maru" in the position in which she lay?

A. Well, the distance is a little bit close from where I was on a dark night; you would not attempt it; you would attempt to go down the channel side, the channel which is supposed to be left for the channel; wouldn't attempt to go way off out in that dark hole, that distance you had to make this turn—nobody would.

(Testimony of E. H. Berry.)

Q. You say no pilot would navigate that portion of the river?

A. Not with a big ship; no. A small ship you might go out there all right.

Q. Suppose you had been meeting a vessel coming up the river, and it was approximately at a point in the river where the bow of the "Boston Maru" was resting. On which side would you have proceeded, on which side of the river, the Washington or the Oregon side?

A. I would go on the side which is to the Washington side of a ship coming up.

Q. Then that would have required you to have navigated further towards the Washington side than where the bow of the "Boston Maru" was?

A. When ships pass each other in the river going opposite directions, usually one will keep the right hand of the channel and give the other one a chance to keep to his right hand of the channel.

Q. Then you could have navigated that portion of the river if you had been correctly advised of the position of the "Boston Maru," could you?

[140] A. No, I don't know as I could.

Q. You don't think you could?

A. No, I don't think I would have made it out there.

Q. Now, where were you—will you kindly indicate on the chart just where you were when you first noticed this suck you speak of?

A. I was right down along Columbia City; I was right down along here, right along close to this



(Testimony of E. H. Berry.)

thirty-foot contour here. She started to suck right as I came down here. I starboarded a little, came right down along this, inside of that thirty-seven foot mark. All along here she sucked; the stern wanted to go to this bank, the Oregon bank; the bow wanted to go out.

Q. Will you kindly mark the point on the chart where you say she began to suck, where she first began to suck the shore?

A. Well, right along in here, right along just inside of this mark here, inside of that thirty-seven foot mark.

Q. Now, just indicate that. Take that other pencil and write out there where she began to suck, with dotted line out. Captain, you have made a red cross a little down the river from Columbia?

A. From Columbia City.

Q. From Columbia City front light, is that?

A. That is St. Helens bar front light.

Q. And you have written on the chart, "At the time began to suck the shore." A. Yes.

Q. How many feet were you then away from the point of collision?

A. Oh, I don't know; might have been a thousand feet.

Q. Just what direction was the bow of your vessel pointed at the time you noticed that it began to suck the shore? Will you put an arrow on there to show which way you were pointed?

A. Well, I was coming down right along close to parallel with shore.

(Testimony of E. H. Berry.)

Q. Your bow was pointed parallel to the thirty-foot contour line?

A. Well, in that direction down. I figured on missing the "Boston [141] Maru's" stern.

Q. Now, do you say that the "Boston Maru" was then as shown on this chart? A. Crossways.

Q. Exactly crossways?

A. Almost, as near as I could tell.

Q. That is your present recollection? A. Yes.

Q. You remember testifying, don't you, Captain, before the local inspectors?

A. I said very close to crossways, is what I told them.

Q. The matter was fresher in your mind, of course, at that time, than it is now. Is that right? That hearing was shortly after—

A. I remember, however, distinctly, it was very near crossways of the river.

Q. I will ask you if at that hearing held on November 7, 1924, you were not asked this question: "When you first discovered her she was almost straight across? A. Yes, sir, almost. Q. At an angle of forty-five degrees? A. I think a little more than that." Did you make that answer?

A. Well, perhaps I did. Anyway that goes to show that I meant that she was most straight across.

Q. Now, will you just take these small boats here—the proportions are not accurate—but will you just set them there and show the Court just what position they were in when they collided. This will be a bigger scale.

(Testimony of E. H. Berry.)

A. Which is going to be the "Boston Maru"?

Q. You take either one you want.

A. Well, that is almost straight across the river; of course they are too large for this; that is about the way we hit; she wanted to come this way all the time; that is the reason I had to go onto her starboard, keep her bow away from this; that is just the way she hit. [142]

Q. Now, what part of the "Boston Maru" did you hit? A. Starboard counter aft.

Q. What portion of the "West Keats" struck the "Boston Maru"? A. Starboard aft.

Q. Right there beginning at the hawse-pipe?

A. Yes, sir.

Q. Now, this seems to be—the position you place them in seems to be correct with respect to the "West Keats," but that doesn't seem to be the point of impact.

A. Yes, that is right on that counter right there, right there on that quarter, ruffled all up, you bet, came this way; I don't know that I placed it just exactly right, but approximately.

Q. There is a picture in evidence here, "Boston Maru" Exhibit "E." Does that indicate the damage there?

A. Yes, that there is right there; her stern is rounded; this has got corners on it; her stern is rounded, isn't corner like that.

Q. She has got no corner on it.

(Questions by Mr. McCAMANT.)

May I be permitted, your Honor. Now, Captain, will you place your vessel, the "West Keats," in

(Testimony of E. H. Berry.)

the position in which she was at the time of the collision, how she was headed?

A. Well, as near as I could say, they were just about like this.

Q. Now, her stern, then, was out from the shore a considerable distance further than her bow, wasn't it? A. Her stern was sucking to the shore.

Q. Well, will you look at—you have indicated on the plat, haven't you, the approximate position of the "West Keats" at the time of the collision?

A. They are too large for this chart, sticks way up here a mile above Columbia City, her stern does here. [143]

Q. But she was pointed in substantially the condition which you have indicated?

A. I am not supposed to be right accurate about that.

Q. Make it as accurate as you can. I would like to know just how your vessel was headed at the time of the impact.

A. Well, here is the way ships ordinarily was; here is the way they hit, like that.

Q. Now, the stern of the "West Keats" was out in the channel a considerable distance further than her bow at the time of the collision, wasn't it?

A. Her stern was sucking to the bank all the time, and her bow wanted to come out; that is what I didn't want.

COURT.—The way you put the model on the map there, shows the stern was out in the channel.

A. Well, but sir, here the stern is too long, it pro-

(Testimony of E. H. Berry.)

jects way up here; this ought to be just a little bit of a thing right along the bank.

COURT.—But you could place that to show, couldn't you, something about what you claim to be the fact?

A. See, here is the bank, right here.

Mr. SNOW.—He is trying to put it parallel with the bank.

A. You can't do it; the only way you can do is to do the best you can in placing it; that is ordinarily the way they hit.

Q. What was the fact, was your stern further out in the channel than your bow at the time of the collision?

A. I couldn't see the shores; I was coming down there; I knew I was close out and she was sucking ashore.

Q. Then your answer is, that you don't know whether your stern was further out from shore than your bow was at the time of the collision. Is that so?

A. I don't know as it is necessary for me to know that. [144]

COURT.—Do you know, Captain, whether or not?

A. I couldn't see the shores, sir.

COURT.—Do you know whether your stern was further in the channel than the bow, or not? You either do know, or you do not.

A. Well, I was following right down along the shore, sir, and her stern was taking for shore.

(Testimony of E. H. Berry.)

COURT.—That isn't an answer to the question. If you know, say so, and if you don't know, you can say you don't.

A. I guess I don't know.

Q. You don't know?

A. Perhaps I don't know what you mean.

Q. I want to know which end of your vessel was nearest the Oregon shore at the time of the collision, if you know.     A. Suppose I couldn't say either.

Q. It may be that you don't know, Captain, but if you know, I would like to have you tell me.

A. I know it was close enough to suck her over into the shore.

Q. Well, how do you know it was close enough to suck?

A. Because her stern went that way strong, hard starboard pull on her; whenever a ship don't answer then I knew I was close to shore, and I knew when a ship does that she is sucking shore.

Q. Your vessel didn't collide right at her bow with the "Boston Maru," did she?

A. Started at the hawse-pipe, I believe, broke that first.

Q. How far is the hawse-pipe off the bow of your vessel?

A. Maybe three feet or so, four feet, five; I don't know just now; around there.

Q. The point at which the collision occurred, however, was on the starboard side of your bow?

A. Yes, sir.

Q. And at the hawse-pipe?     A. Yes, sir.

(Testimony of E. H. Berry.)

Q. And the point at which the "West Keats" collided with the "Boston [145] Maru" is correctly shown by "Boston Maru" photograph E, is it not?

A. Yes, that is the "Boston Maru's" stern, right exactly where I have those placed.

Q. Now, as you have these vessels placed at present, it is true, isn't it, that the stern of the "West Keats" is further out than her bow?

A. You can't judge on a big model like that, relative to that size map; you can't tell a thing about it.

Q. Let me ask you this question: Is it possible that these two vessels could have collided at the point indicated on these photographs to which I have called your attention, "Boston Maru" Exhibit "H," and "Boston Maru" Exhibit "E," unless the stern of the "West Keats" was further out from the Oregon shore than her bow?

A. I don't know that I can answer that question.

Q. Well, if you can't answer it, I haven't anything more to say along that line. But if you have any explanation of how your vessel could have hit the "Boston Maru" at her starboard hawse-pipe, and the "Boston Maru's" damage was as shown on "Boston Maru" photograph E, I would like to have you explain it.

A. You can see right there, can't you, that the "Boston" bow hit the starboard quarter—the "West Keats'" bow hit the starboard quarter of the "Boston Maru." Can't you see that?

Q. I can see that point some few feet back of the starboard bow of the "West Keats."

(Testimony of E. H. Berry.)

A. You will have to get a rounding boat before I can do any better than that, because I want to put that corner on the stern, and she didn't hit it square; she hit the quarter, you might say.

Q. Yes, hit the quarter; but your vessel on colliding hit the starboard hawse-pipe?

A. Yes, I believe it did; started right at the hawse-pipe.

Q. And you still say you don't know whether your bow or your stern [146] was further out in the channel at the time of the collision?

A. I don't know as anybody could on a dark night; I don't know as it is necessary for me to make any assertion of that at all.

Q. Not necessary unless you want to. Captain, when you came into the Columbia River that night your orders were full speed ahead? A. Yes, sir.

Q. And that continued to be the course of your vessel—that continued to be the bell on which you were operating, up until one minute before the collision. Is that so? A. Yes, sir.

Q. You have had a good deal of experience in regard to suction, haven't you?

A. Yes, lots of experience in every way.

Q. That is part of the instruction necessary in piloting a vessel up and down this river, to know the effect of suction? A. Yes.

Q. Now, is the suction greater when a vessel is going slow ahead, or when going full speed ahead?

A. You will counteract this suction more if your ship is full ahead with the rudder hard over. You



(Testimony of E. H. Berry.)

will counteract that more than you would if you were going slow and your propeller were turning over very slow; she won't have a tendency to kick her bow in against the stern sucking in, as much as she would with full ahead.

Q. In other words, you think your vessel will steer better if going full speed ahead?

A. Yes, sir.

Q. But the suction is greater, isn't it, when the vessel is going full speed ahead, than it is when half speed ahead, isn't it?

A. Yes; but from that time I had any idea there was going to be a collision, if I had slowed the ship down then it would have been the result of cutting the "Boston Maru" in two.

Q. Suppose you had slowed your vessel down when you first saw those [147] lights ahead? You have testified that two miles or more up the river you could see some lights ahead, didn't you?

A. Yes. I didn't see they were anchor lights, though, two miles up the river.

Q. But you saw some lights ahead, didn't you?

A. Yes, sir.

Q. But you didn't know what they were at that time, did you?

A. No, that is, you—well, I hadn't seen the anchor lights at that time; I saw the Columbia City lights; that is nothing to worry about whatever.

Q. You saw some lights which afterwards developed to be anchor lights of the "Boston Maru"?

A. Yes, sir.

(Testimony of E. H. Berry.)

Q. You saw those when two miles or more up above where the "Boston Maru" was anchored?

A. No, I didn't see them two miles.

Q. How far were you?

A. I would say a mile when I first saw them.

Q. Within a mile away, you have already testified you recognized those lights as the lights of the "Boston Maru," haven't you?     A. Yes, sir.

Q. You saw them before you recognized they were the lights from the "Boston Maru," didn't you?

A. I saw them before I knew they were?

Q. Yes. You saw them down the river—

A. Oh, I saw lights—

Q. Quite a little while before you knew were lights of an anchored vessel, didn't you?

A. I suppose I did.

Q. You didn't slow down your vessel when you saw those lights ahead the first time, did you?

A. No, no.

Q. And you didn't slow down your vessel when you recognized that those lights were the lights of a vessel at anchor, did you?

A. No, sir, I didn't. [148]

Q. You didn't slow down your vessel?

A. No, sir.

Q. Or do anything to check your speed at all, until one minute before the collision, did you?

A. No, sir; didn't want to cut her in two.

Q. And you at no time made any maneuver to pass on the Washington side?

A. No, no; when I first saw these lights I had no

(Testimony of E. H. Berry.)

occasion to slow down, or no occasion whatever for slowing down.

Q. You knew that if you came close to the Oregon shore there would be suction on your stern, didn't you?

A. I know that always if I get too close to shore, yes.

Q. And with that knowledge you still elected to come close to the Oregon shore in passing the "Boston Maru"? A. Yes, I had to do it.

Q. And you as a matter of fact got by on the Oregon shore after the collision, didn't you?

A. Collided in going by, yes, because there wasn't room enough.

Q. The collision didn't—did the collision sheer you towards the Oregon shore?

A. No, the impact was not great.

Q. A glancing blow, was it?

A. Just a glancing blow.

Q. You don't think it appreciably affected the course of your vessel?

A. No, I didn't notice it did.

Q. But you did go by on the Oregon shore without touching the bank?

A. Yes, without touching; the suction was strong.

Q. And you were able in the course of three minutes, to turn your vessel around. Is that right?

A. Yes.

Q. And then you came up on the Washington side? A. Yes, I had to.

Q. And another vessel came up on the Washington side? [149]

(Testimony of E. H. Berry.)

A. I told him to come up on that side.

Q. He had no trouble getting by on the Washington side? A. No.

Q. And you had no trouble getting by on the Washington side? A. No, sir.

Q. And at this time, the time of the collision, you never had seen this chart which we have here showing this shoal out from the Washington side?

A. No, sir, I never had seen this chart.

Q. From where the "Boston Maru" was anchored.

A. No, sir, I never had seen this chart or one like it.

Q. When a vessel anchors at ebb tide with her head pointed upstream, and her stern downstream, is there any way to tell which way she will swing?

A. Depends on the wind, sir.

Q. That evening the wind was negligible, and you have so testified, haven't you? A. Yes, sir.

Q. When the wind is not negligible—When the wind is negligible, is there any way of telling in which direction a vessel will swing when the flood tide comes in?

A. There are in some places where you anchor; if you are anchored relative to a range somewhere, your stern is perhaps pretty well down towards this point, you know the current is coming this range, and perhaps will hit the port or starboard stern, whichever it may be, and you can very near tell which way will swing certain places.

Q. Those are only occasional places in the river?

(Testimony of E. H. Berry.)

A. Yes.

Q. Generally speaking, is it possible to tell in which direction the stern will swing when it swings with the flood tide? A. I didn't get you.

Q. Generally speaking, with a vessel anchored in the Columbia [150] River, is there any way of telling, if there is no wind, or no appreciable wind, which way will swing when the flood tide comes on?

A. No, sir, not generally, there is not.

Q. She starts to swing the first of the flood tide, doesn't she? A. Yes.

Q. Swing very slowly, and on low water begins her movement when the water is low, doesn't she?

A. And coming in.

Q. The movement starts, however, when the water is at its lowest, doesn't it? A. Yes.

Q. As far as the tide is concerned. How much water was the "West Keats" drawing at that time, Captain? A. Twenty-five feet, eight inches.

Q. A vessel drawing twenty-five feet, eight inches needs how much of depth in the water to navigate comfortably and safely?

A. Oh, you can take a ship drawing twenty-five feet, eight inches over—you can take that down the river, twenty-five feet eight inches, you can take that down over twenty-six feet of water. If the channel runs under twenty-six feet any time, you can take them in that; we take ships down here drawing thirty feet, and perhaps wouldn't be but very little over thirty feet of water. Of course that

(Testimony of E. H. Berry.)

is not all the way, but I say occasionally lumps or sand washes in the channel at times.

That is very difficult navigation if the depth of the water is not more—is so close to the draft of the vessel, isn't it, for any length of time?

A. Yes, sir, it makes it very difficult, yes, sir.

Q. And it is not good navigation to court that sort of a situation, if you have any choice, is it?

A. No, I wouldn't think so; no. [151]

Q. You ought to have at least a couple of feet leeway in order to be thoroughly safe, shouldn't you?

A. Oh, usually try to get all the water we can in navigating deep water vessels.

Q. You say you knew of a vessel five hundred feet in length anchored in this general neighborhood down in the Columbia River, that swung towards the Oregon shore? A. Yes, sir.

Q. You have also known them to swing toward the Washington shore, haven't you, at that point?

A. Yes, sir.

Q. As a matter of fact, they more often swing to the Washington shore than to the Oregon shore, don't they? A. I would not say as to that.

Q. You can't tell which way going to swing, can you, in the absence of a wind controlling the movement? A. I don't know that you can.

Q. Did your lookout report the "Boston Maru" ahead that night, Captain?

A. Yes, he reports that he did.

Q. Did he report to you?

(Testimony of E. H. Berry.)

A. I don't know; I didn't hear that he did. I perhaps was attention called, or something like.

Q. You are unable to say of your own knowledge whether or not he reported the vessel?

A. No, I couldn't say.

Q. And if he did report it, you don't know when he reported it? A. No, sir, I don't.

Q. The first knowledge you had of it is, as you have testified, when you discovered that these lights were anchor lights? A. Yes.

Q. And you found the lower light nearer the Oregon shore than the higher light? A. Yes.

Q. What do you now say as to the angle at which the "Boston Maru" [152] lay with the Oregon shore? A. I say she was very near crossways.

Q. That would be ninety degrees?

A. Crossways would be ninety degrees, would it?

Q. Yes.

A. Well, she was maybe a little less than ninety degrees.

Q. Didn't you say—didn't you testify it was a little more than forty-five degrees, when the matter was fresh in your mind?

A. Yes, I did, perhaps; but I perhaps didn't know just how much that would be, or maybe didn't designate how much more than forty-five degrees.

Q. And with your memory refreshed, your notion is that the vessel was nearly athwart the channel?

A. Yes, sir.

Q. And you say that that was the position of the

(Testimony of E. H. Berry.)

“Boston Maru” at the time you recognized the lights to be anchor lights. Is that right?

A. Yes, sir.

Q. And you still continued to come full speed ahead up within a minute before the collision?

A. Yes, sir.

Redirect Examination.

(Questions by Mr. SNOW.)

Captain, speaking of the five hundred-foot vessel which Captain Pierson—which you anchored and which Captain Pierson passed—which side was he, the Oregon side or the Washington side?

A. He passed the Oregon side. My ship was five hundred twenty-five feet long, that I anchored there.

Q. As you came down and approached the “Boston Maru,” what lights or other objects were visible behind her to line her up by and get an idea of her approximate location?

A. There were none that I could see.

Q. There were lots of lights opposite her at Columbia City? [153] A. Columbia City.

Q. Were there no lights below her?

A. No, sir I couldn't see any.

Q. Speaking of the individual soundings made by pilots, isn't it a fact that the pilots more often than usual take soundings at the time they come to an anchor?

A. Yes, sir, they do when they come to an anchor; quite often they do drop the lead for their satisfaction and the master of the vessel.



(Testimony of E. H. Berry.)

Q. The suggestion was made that you might have slowed down two miles above the place of collision when you first saw the cluster of lights, among which you may perhaps have seen the lights of the "Boston Maru." It is customary to slow down when you come to a cluster of lights like that?

A. No, sir.

Q. Is it customary to slow down in passing an anchored vessel at that point?      A. No, sir, never.

Q. Did you get any whistle, signal light, or warning, from the "Boston Maru," at or before the time of the collision?      A. No, sir.

Recross-examination.

(Questions by Mr. McCAMANT.)

You are familiar with the lights of Columbia City, are you not?      A. Yes, sir.

Q. Those are stationary lights, the same every night, are they not?      A. Yes, sir.

Q. You have been up and down there, of course, a great many times by night?      A. Yes, sir.

Witness excused. [154]

## TESTIMONY OF CAPTAIN S. S. BALDY, FOR THE GOVERNMENT.

Captain S. S. BALDY, a witness called on behalf of the "West Keats," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

You are a Columbia River pilot?      A. Yes, sir.

(Testimony of Captain S. S. Baldy.)

Q. How long have you held a license?

A. You mean the federal license?

Q. Yes. A. Since 1906.

Q. How long have you had your state branch?

A. September, 1922.

Q. You are a member of the Pilots' Association?

A. Yes.

Q. Are you familiar with that part of the Columbia River approximately opposite Columbia City, and also the parts above and below that, immediately above and below it? A. Yes, sir.

Q. Let me ask you this: Whether there is an anchorage ground located at that place.

Mr. KING.—I object to the form of that question. I think it is conclusion.

COURT.—Rather a conclusion, I imagine. He can state the facts about vessels anchoring there if he wishes to.

Q. State whether or not vessels are sometimes anchored there?

A. Yes, sir, we anchored there at times.

Q. How would you anchor a vessel there at night assuming there was no fog and you could see lights.

A. Well, I would anchor on them red range light there 28-2.

Q. By red range light, you mean you would—

A. Put that on line with 27-2.

Q. 28-2 on 27-2.

A. That is one range; open that up well to the left, out from Columbit City lower back range.

(Testimony of Captain S. S. Baldy.)

Q. Did other pilots anchor in that vicinity at times?

A. Yes, a mark we go by when we anchor the ship there to load or do anything out there. We figure easy for ships there to load timber, load off barges; sometimes too deep to load at Columbia City or St. Helens, and take there and anchor there. That is a mark we always use, also a mark on Lamont bluff and St. Helens courthouse. We leave the courthouse well open on Lamont bluff, but we generally as a rule use that red range as I say. It is very easy to pick up and very simple.

Q. What is that?

A. That is very easy to pick up and very simple to go onto out off Columbia City there.

Q. Have you ever passed other vessels at that portion of the river anchored there.

A. You mean anchored? A. Yes, anchored.

A. Pass them anchored out there on these grounds I am telling you about.

Q. Now, what is the ordinary way of piloting a vessel—you are familiar by the way with the "West Keats." A. Yes.

Q. And these other shipping board vessels of eighty-eight hundred tons. A. Yes.

Q. What is the ordinary way of piloting a vessel of that class up and down the river at that point?

Mr. McCAMANT.—We object to that, it is an attempt to vary the statute by evidence of custom. I don't think it is admissible. The statute provides a vessel should keep on the starboard side of the

(Testimony of Captain S. S. Baldy.)

channel. This is an attempt to prove the pilots here have a custom to go on the Oregon side of the *custom*.

Mr. SNOW.—I might take up that point briefly now. [156] I am not trying to vary a statute by custom. In the first place the contention is made we are not dealing with the so-called starboard side or right-hand side rule, narrow channel rule, in this case.

COURT.—I don't understand your question. What is the custom you are asking the witness? What is the custom in navigating vessel like the "West Keats" up and down the Columbia River.

Mr. SNOW.—At that point, yes.

COURT.—You mean on which side of the river he passes vessel at anchor?

Mr. SNOW.—I meant to ask which range is used, what lights used and how you use them.

COURT.—Ask him.

A. Well, we come down the St. Helens range as a rule, or down Columbia City range; there is two ranges, one back, one ahead. Generally we follow the Columbia range down until we get somewhere abreast Columbia Mills.

Q. Which is the upper range? The range leading up the river when we come down, or the one leading down?

A. Well, come down on it. After we make the turn on the upper range, 27-2, with white light behind when we turn there—sometimes we turn then and head up the Columbia City range. Of course,

(Testimony of Captain S. S. Baldy.)

the channel is over close to the Oregon shore. We come pretty well down to the Oregon shore there and make a turn to deep water there and turn to follow that shore more or less—to that shore, until we get down on to the ranges leading down to Marton Islands on the other channel—the other course.

Q. As you come down on the St. Helens bar range, let's assume, Captain, that there is a vessel approximately four hundred feet in length anchored at a point marked "position of collision" on "West Keats" Exhibit 1, which you now have before you, assuming a vessel anchored [157] at that place at night with her lights showing, at what point as you come down on the St. Helens Bar range, or as you approach that vessel, could a pilot probably discover how close the vessel is to the Oregon shore, and her distance from the Oregon shore.

A. Well, he would probably be down around the Columbia City dock, mill dock, down about abreast that dock. That gets you down into,—well, into deep hole in the channel. Have to get down about that far when you can decide just where—

Q. What is there behind that vessel in order to line her up by?     A. Behind the vessel at anchor?

Q. Yes.     Nothing there but the dark bank.

Q. Nothing but dark—

A. The dark bank, there, is a high hill there, you know.

Q. Let's assume that in the night in question it was

(Testimony of Captain S. S. Baldy.)

very dark but the visibility was good in respect to lights.

A: See the overland there—the high land. A high bluff there, very high and very dark, which casts a shadow out quite a ways from there.

Q. If the vessel is coming down the St. Helens Bar range, state whether or not it would be a reasonable assumption on the part of the pilot, piloting that vessel, if he assumed that the vessel at anchor was further out and anchored on the—

Mr. McCAMANT.—That is not a proper question for an expert.

COURT.—No, not what the pilot might reasonably assume. That is for the Court to say, not this witness.

Q. At what point above the “Boston Maru” as shown in the position marked “place of collision,” could the “West Keats” in coming down the river have safely turned to pass on the Washington side?

A. You mean if he had known that the “Boston Maru” was in that place?

Q. Yes, if he had known that she was there.  
[158]

A. Well, to get down in here if he had known she was anchored in that position, possibly,—might have possibly made the turn.

Q. You point to a place approximately half a nautical mile. A. About half a mile.

Q. When he got to that place could he have known where she was—the “Boston Maru”?

(Testimony of Captain S. S. Baldy.)

Mr. McCAMANT.—That is not a proper question for expert testimony.

COURT.—How does he know?

SNOW.—This witness is familiar with the location.

COURT.—But he doesn't know what the pilot of the other vessel knew about it.

Q. You heard Captain Berry's testimony just now, Captain, did you?     A. Yes.

Q. Suppose you had been on the "West Keats" in his place; at what point do you think you could have determined where the "Boston Maru" was anchored.

A. Well, I wouldn't probably have turned out much quicker than he did, because naturally we would think the vessel was anchored over where she was anchored in clear weather. I never seen a ship anchored there in my life in clear weather.

COURT.—What kind of weather?

A. Clear weather, I mean not foggy.

COURT.—Do they anchor there in the fog?

A. In fog we anchor anywhere we can. Naturally a man coming down in the fog don't figure a vessel anywhere; we stop and get the headway off the vessel. Some places along that river we have places to anchor, and generally swing to one side there and anchor. This is one of the places as long as the atmosphere is clear, as a rule, we go out to the anchorage grounds.

Q. Now, Captain, were you coming up the river on another vessel? [159]     A. Yes.

(Testimony of Captain S. S. Baldy.)

Q. On the night of that collision?     A. Yes.

Q. What vessel were you on?

A. On the "Siersted," a Norwegian steamer.

Q. Were you her pilot?     A. Yes.

Q. Did you have any other pilot with you?

A. Yes, I had; Captain Caples was with us.

Q. In what capacity was Captain Caples with you?

A. He is one of the apprentice pilots, we call it; helping pilot.

Q. When did you first notice the lights of the "Boston Maru" as it came up the river?

A. I never notice them until after the "West Keats" had given me two whistles to pass me.

Q. Until after that the "West Keats" what?

A. After the "West Keats" gave me two whistles to pass her on the other side; then she turned on a lot of extra lights, cargo lights you might say, the "Boston Maru" lights. Then we noticed a ship lying there.

Q. Where was the "West Keats" when she gave you two whistles to pass on the other side?

A. She had come below the "Boston Maru" and swung straight across the river.

Q. Did she swing to starboard or port?

A. She swung port, on a hard-aport helm.

Q. What light did she show you?

A. Showed me green and red when come by this Norwegian steamer—I mean this "Boston Maru," but all at once her two main lights above, and square across the river, and I put my helm hard astar-



(Testimony of Captain S. S. Baldy.)

board and beat it for the woods on Caples Shore.

[160]

Q. That is, you headed over to the Washington side?

A. I gave way to her. We were pretty close and he had no chance to cross me.

COURT.—Gave way to who?

A. To the “West Keats.” He was coming this way.

Q. He gave you two whistles, you say?

A. He gave me two whistles; that let me know what he wanted.

Q. Do I understand you to say you didn’t see the “Boston Maru’s” riding lights until you got these two whistles from the “West Keats”?

A. No, sir, hadn’t discovered.

Q. How far were you then from the “Boston Maru”?

A. Well, I suppose three-quarters of a mile when I first noticed come by that vessel.

Q. When you first could see her lights?

A. I mean the “Boston Maru’s” lights.

Q. How far were you from the “Boston Maru” when he gave you the two whistles to pass to the Washington side, and you saw the “Boston Maru’s” lights?

A. I didn’t see the “Boston Maru’s” lights when he whistled to me; he hadn’t turned the cargo lights on yet, you see.

COURT.—Who hadn’t turned the cargo lights on?

(Testimony of Captain S. S. Baldy.)

A. The "Boston Maru." You see she had two anchor lights up, as I suppose; I never saw them.

COURT.—Didn't see the anchor lights?

A. So when I was heading up the river, I was heading direct for Columbia City sawmills with a lot of lights; and the "Boston Maru" was directly between these lights and me; that would put her two lights among the whole cluster.

Q. On receiving this whistle from the "West Keats," did you then go on up the river?

A. Yes, I answered, his whistles immediately and put her half ahead [161] and hard aport to get my vessel straightened back to come back into the channel. I had swung over towards Caples Shore to clear her. I didn't know what was the matter when I saw the position; thought his vessel was out of control and was up to me to give way to her, to swing towards Caples Shore.

Q. You didn't actually know *then* had been a collision? A. No, I didn't know was any collision.

Q. What portion of the river did you navigate in going up past the place of collision?

A. Well, I was—at the time I went by her, I was a little to the left of them ranges I spoke about—28-2 and 27-2.

COURT.—At the time you went by whom?

A. Went by the "Boston Maru."

Q. Did you see the "Boston Maru" as you went by? A. Yes, sir.

Q. How far away was it if you can judge?

A. Oh, probably 450 feet, 500 feet. When the

(Testimony of Captain S. S. Baldy.)

“Boston Maru” turned on all her lights she began to flash lights; the apprentice pilot and I didn’t know what was going on there for a minute. When we seen all them lights, we decided was another vessel anchored in the channel; I said then to the apprentice pilot, “They have had trouble there”; this vessel was throwing on some signal lights; I stopped my vessel; the boat was going ahead; I looked around, and the “West Keats” turned around and was coming back so was no use for me being there, so I went on; the “West Keats” was coming back in case of trouble.

Q. Did you say anything else to the apprentice pilot about the location of the anchorage of the “Boston Maru”?

Mr. KING.—I object to that.

COURT.—He can testify to what he knows himself.

Q. Referring again to the chart that you have there, “West Keats” Exhibit No. 1, and to that piece of water which has been referred to [162] as shoal in the testimony, right opposite the place where the “Boston Maru” was anchored, did you ever hear of the location of any shoal there?

A. No, sir, I never paid any attention to it, anyway.

Q. Never paid any attention to it, did you say?

A. No.

Cross-examination.

(Questions by Mr. McCAMANT.)

Captain Baldy, if I understood you correctly, you

(Testimony of Captain S. S. Baldy.)

said that it was customary to anchor off Columbia City, and you would follow either this red range or the range, Lamont Bluff range; is that right?

A. Well, we used that sometimes if anything causes these lights or either one of them be out, you could open this light out well on the courthouse, you see.

Q. Suppose you anchored opposite Columbia City and on the red range as you call it, calling your attention to the line purporting to show that range on "West Keats" Exhibit No. 1, and suppose your vessel was drawing upwards of twenty-six feet of water at her stern; suppose a flood tide was swinging her stern over towards the Washington shore, what would happen assuming the chart correctly indicates the depth of the water?

A. If you anchored her off Columbia City—you mean here?

Q. Yes. A. I wouldn't anchor there.

Q. If you had a vessel drawing upwards of twenty-six feet of water you couldn't anchor on this red range opposite Columbia City range light, could you?

A. Put her here, would anchor way over from that range, or go below this.

Q. Would have to go further down the river in order to make it safe [163] to anchor on that range, wouldn't you; and the same would be true as to the range running up to the courthouse and Lamont Bluff, wouldn't it?

A. This range running Lamont Bluff to the

(Testimony of Captain S. S. Baldy.)

courthouse would get you on top of the shoals here.

Q. But if you wanted to anchor out from the Columbia City range, you could tie to either of these ranges, if your vessel was drawing twenty-six feet of water, could you?

A. I wouldn't want to anchor there.

COURT.—But if you did want to anchor there.

A. I would not want a deep vessel there because we don't make a custom to anchor there.

Q. Didn't you say on your direct examination that it was the custom for vessels to anchor out from Columbia City range light?

A. Not this one here you spoke about; below this range; we go below that, we are in deep, if want to lay there to load.

Q. You can't get in to St. Helens, can you, in low water in October with a vessel drawing twenty-six feet of water?

A. I wouldn't want to go in there, anyway.

COURT.—Could you do it, counsel asked you.

A. At that time we didn't figure on going in there at low water; no, not at that time.

Q. You need the benefit of the tide in order to get there safely when the water is low?

A. We always figure on getting the tide to go in there.

Q. A vessel coming down the river with intent to go into St. Helens has to anchor somewhere in this neighborhood, unless it strikes the right tide when it gets down there?

(Testimony of Captain S. S. Baldy.)

A. Unless it has the right tide to turn up, you mean?

Q. Yes.

A. Yes, we would anchor there somewhere to wait for the tide. [164]

Q. Now, coming back to the question I asked you a moment ago, I don't think you answered it one way or the other; I gathered your meaning, but now want to be sure to have it correct in the record. you agreed with me, didn't you, that it would not be safe to anchor a vessel drawing twenty-six feet of water off either the red range or the Lamont Bluff range directly out from Columbia City?

A. You mean from this light here?

Q. Yes.

A. I would not anchor a ship there.

Q. Would it be safe to anchor there?

A. No, sir; I would put her below.

Q. Will you point on the map where the Columbia City mill is? Is it this structure lying out on the bank opposite the high tower?

A. That is the Columbia City mill.

Q. Pointing to a structure on the bank opposite the high tower, "West Keats" Exhibit No. 1.

Witness excused. [165]

TESTIMONY OF CAPTAIN R. SANDSTROM,  
FOR THE GOVERNMENT.

Captain R. SANDSTROM, witness called on behalf of the "West Keats," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

You are one of the Columbia River pilots?

A. Yes.

Q. Belong to the association?      A. Yes.

Q. How long have you held a license?

A. About fourteen or fifteen years, branch license, state branch.

Q. How long have you had a federal license?

A. About since ninety-eight, 1898.

Q. During all of that time have you been engaged as a pilot?

A. Piloting ships the last fourteen or fifteen years.

Q. Are you familiar with that part of the river opposite Columbia *River* and extending above and below it?      A. Yes, sir.

Q. Have you heard some of the testimony in this case, Captain?      A. Yes, sir, I have.

Q. Do you sometimes anchor vessels at some part of the river near Columbia City?

A. Yes, sir, I have at different times.

Q. Do other pilots anchor there, too?

A. Yes, sir.

(Testimony of Captain R. Sandstrom.)

Q. How do you bring a vessel to anchor, opposite what place and at what distance and by what lights?

A. We generally, as a rule, drop down below the front range of Columbia City ranges and come in on the red ranges of the jetties; the red light on the lower end of the jetty is what we now know as the front light on the St. Helens range—or inside of that, down toward Caples Point. [166]

Q. I am not referring so much to the river as it is now, Captain, because changes have been made, as you know, but the river as it was two years ago, in October, 1924; you then anchored off of what is known as red range, didn't you?

A. Yes, sir, what we called red range, which was the lower end of the jetty light, forming range with the jetty light that extended up above; that formed a range and we would go on that or inside of that down towards Caples Point; was according to if we had swinging room, we anchored the vessels there for loading them on deep draft, when they couldn't have water enough at Columbia City or St. Helens.

Q. Have you seen in the past there, vessels anchored at that location?     A. Yes, sir.

Q. By other pilots?     A. Yes, sir.

Q. What can you say as to whether or not there is a custom with respect to anchoring vessels there?

A. That has always been the custom to anchor towards the Washington shore.

Q. Referring to "West Keats" Exhibit No. 1, this chart opposite the Columbia City front light and



(Testimony of Captain R. Sandstrom.)

near the Washington side of the channel shows some soundings surrounded by dotted lines, in the center of which is the sounding twenty-five feet, indicating an area of somewhat shallower water than the balance of the channel. In anchoring vessels in that place, what account would you take of that area of shallow water, if any.

A. That depends on the operation of your vessel. If you have a vessel drawing twenty-one to twenty-three feet you wouldn't pay any attention to it, probably, that is of that depth of water, twenty-five feet; figure you have clearance under it to swing it, but deeper draft vessel you would have to go below to be able to swing clear; would go below; big basin down in below there. [167]

Q. Do you know of the location of that shoaler—that shallower portion of the river?

A. Yes, sir, sound it myself all the time.

Q. Have taken soundings? A. Yes, sir.

Q. When you anchor a vessel do you customarily take soundings?

A. As a rule, we drop a lead to see how much water we are in at night-time, when the visibility of lights *are* poor or you are not quite sure of yourself, or distances which the atmospheric conditions create.

Q. Where is the main ship channel at that point for navigating up and down the river?

A. Well, the main ship channel you come down on these ranges until you get about abreast of what we call the dock of the Western Spar Company,

(Testimony of Captain R. Sandstrom.)

their mill there at Columbia City, before you start swinging for the lower course; that just above the old—the front range or was the front range at that time of St. Helens range; just above that before you make the turn; you run approximately fifteen hundred to a thousand feet probably above it, before you start swinging; that brings you—

Q. You mean at about fifteen hundred to a thousand feet above the range light of St. Helens upper range you start swinging. A. Yes, sir.

Q. And which way do you swing?

A. Swing to starboard; down towards Columbia City ranges; down to what we call Deer Island.

Q. What shore do you follow down to get to Columbia City range?

A. You are on the Oregon shore.

Q. Now, assuming a very dark night, without fog, however, and without rain, or without excessive rain at any rate, and visibility good as regards lights, assuming a vessel four hundred feet in length at anchor at place marked "position at collision" on that chart; [168] assuming the "West Keats" coming down the river, and assuming yourself as the pilot of the "West Keats," how far above that "position at collision" do you believe that you could determine the exact location of the vessel, the "Boston Maru," which was lying at the place marked "position at collision."

Mr. McCAMANT.—I don't think that is a proper question. We have the evidence of the pilot as to

(Testimony of Captain R. Sandstrom.)

when he did see it, but when this witness thinks he should—

COURT.—The pilot didn't testify, as I remember it, when he determined the actual location.

Mr. SNOW.—This witness is familiar with that portion of that river and the lineup of the banks; he is familiar with the lights.

COURT.—You might ask him if you want how far above that place of anchorage he could determine, if he could, the location of the vessel that is anchored here. You are assuming in your question that the vessel is anchored at the place marked on the chart.

Mr. SNOW.—I don't want to assume that. For the purpose of the hypothetical question he is assuming that the vessel is anchored there, but I don't desire to have that stand as and for proof that the vessel was there.

COURT.—What you want, I suppose, is the idea of this witness as to how far above the anchored vessel one navigating a vessel coming down the river could ascertain is actual location.

Mr. SNOW.—Yes, that is what I want to find. Can you answer that question, Captain?

A. You would have to come down to where you make your turn, which would approximately be from—probably be eight hundred feet or in that neighborhood—you could be one way or the other of it before you could determine; would have to line up with the shore line before you could determine what position that ship would be in. [169]

(Testimony of Captain R. Sandstrom.)

COURT.—You mean eight hundred feet from the ship?

A. From the shore line itself; from the Oregon shore line; you would have to come in that far making this turn and lineup that shore line going down, before you could determine just how far in the ship was, because you would have to see a clearance of water between the ship and the bank as it comes below there, as the ship would be lying—before you got to that point and turn the ship is lying in the shadow of the hills there, dark trees.

COURT.—What point?

A. At this point where you make the turn.

COURT.—Where do you make the turn?

A. We make the turn just about a thousand or fifteen hundred feet above the front range here.

COURT.—Where would that be on the plat?

A. Right here, this is the front range; that would probably be about here.

COURT.—Between a quarter and a half mile from—

A. From your swing this way.

COURT.—Mark that, will you. Now, do your dividers tell you how far that is from that point down to where the vessel is supposed to be at anchor?

A. It is twenty-one hundred and fifty feet.

COURT.—Do I understand, Captain, from your statement, that one turning here where you have marked it at twenty-one hundred and fifty feet

(Testimony of Captain R. Sandstrom.)

from the vessel could have ascertained at that time the location of it?

A. Yes, sir. Just about approximately; where he makes his turn he would come into the shore line that close; you see he is off that range that far, but he is closer to shore line; you see the shore line will show up as he gets in here; here would be the ship; you come down in here and start swinging, comes slowly; you sag in as you come as a [170] rule, and this would be headed this way, down the river; and then you can see the line between the shore and the ship and you can determine then just about how far off she would be, because you have the water show up between the bank and the ship; and then down below—

COURT.—Then, if a navigator at this place, twenty-one hundred feet, whatever it is, from the vessel, should be able to determine the location and how far this boat, the “Maru,” was from shore, what is to prevent him from following on down the channel on the Washington side and passing it?

A. That depends a good deal on the ship and the speed he is going; if he would think he had clearance enough to come here, why he would probably continue so rather than take a chance on setting over across the bow of a vessel, because if he would happen to come down on her, or sag as they go, probably would sag down on her; probably have a tendency to sag down on top of her; it is a dangerous procedure to try and go across another vessel on account of that. When you once get too

(Testimony of Captain R. Sandstrom.)

far over to the one side, like this vessel, say, would be anchored here and coming here pretty well over, now you have got to cross over there practically; well, you would have to come over there probably a thousand or eight hundred feet in order to get across, to go down. Now, you immediately have to go her starboard and you get the bow around here to get around by her safely, otherwise would go on the sand; if any vessel should not happen to answer correctly she would probably go on over.

COURT.—What would be the proper course for a navigator to pursue under these circumstances? In coming down twenty-one hundred feet from this boat the “Maru,” would he be able, then, to determine then how near she was to the Oregon shore.

A. Well, could probably determine that there was room enough. All depends on what position the ship would be in and how it would look to him, and the atmospheric conditions have a lot to do with how the distance looks. Sometimes the atmospheric conditions is so you would [171] judge one hundred feet would be five hundred feet; other times five hundred feet would be one hundred feet.

COURT.—He would be able, at least I understand, to determine two thousand feet away that the other vessel was across the channel?

A. He would determine that that was across the channel, yes.

COURT.—Now, suppose a careful navigator coming up the river or down the river, I think it was, should notice the channel, athwart the channel, a

(Testimony of Captain R. Sandstrom.)

vessel at anchor two thousand feet away from him, what would be the proper course, reasonable and proper course, for the navigator to pursue?

A. When he was down that far the most reasonable course that he would proceed on the Oregon side, to go by on that side.

COURT.—As long as he saw clearance, he wouldn't be expected to slow down the speed of his boat?

A. No, that would probably be a worse thing to do.

COURT.—Why?

A. Because he would lose control if his ship immediately stopped the propeller. This class of vessels the minute you stop the propeller won't steer two lengths themselves.

COURT.—How far would it go on its own momentum?

A. If she would run perfectly straight she would probably go three or four miles on her own momentum.

Q. (Mr. SNOW.) When a navigator reaches that point marked by you on the chart with a red cross twenty-one hundred and fifty feet from the stern of the vessel shown in the position of the collision, the navigator would be able to tell, you think, approximately the distance of that anchored vessel from the shore by the line of clear water which he would see between the vessel and the shore.

A. Yes, sir, just approximately.

(Testimony of Captain R. Sandstrom.)

Q. Now, if it were so dark a night, that the shore at that distance was entirely invisible and only showed abeam in a very hazy black line [172] and the hull of the vessel was entirely invisible, and he could see nothing of the vessel except her riding lights, could he then tell how far that vessel was from shore?

A. No. The atmospheric conditions would have a tendency to shut that view off as to distance, that is to be accurate as to distance because any shadow comes out to meet the stern of that ship; now, from the position that he would be in, he might correctly judge that he is far enough lined up with the shore, and that that ship's stern is off far enough for him to go between, and still be mistaken in it on account of the shadows that would join each other. We all often make mistakes in distances that you will think you are right sure of; unless you have an accurate check line of ranges, marks of your own that you know are positive, why you are not sure of the accurate position.

Q. Now, a navigator coming down in that position which you have marked on the chart, would he have any lights or checks beyond the place marked "position at collision" to check mark and line up by?

A. There is some jetty lights down below, but they may be obstructed by the vessel because they are pretty well out in the river.

Q. And how far away are they?

A. They are approximately a mile and a half or two miles up there. Whether they would be visible



(Testimony of Captain R. Sandstrom.)

through that atmospheric condition is another question.

Q. What would be your judgment? Would they be visible or invisible from that point twenty-one hundred feet above the place of collision?

A. That is what I say. You have to depend on the atmospheric condition for that. On a clear night they would be visible if they were burning brightly.

Q. If they are burning? A. Yes.

Q. And not obstructed by vessel?

A. And not obstructed by vessel. [173]

Q. And on a night dark as the night in question, you would feel, would you, that the navigator, in attempting to pass on the Washington side of a vessel at anchor, from that point would be navigating somewhat sharply, would be maneuvering sharply?

A. I believe he would, yes, take a chance.

Cross-examination.

(Questions by Mr. McCAMANT.)

If the down vessel steers well, responds to her helm well there is no reason why she should not be navigated on the Washington side of the vessel at anchor, from that point, twenty-one hundred and fifty feet upstream, is there?

A. That is a matter of judgment of the pilot and also of how the vessel is handling. A vessel may steer perfectly well and still not answer what we call quickly; she might start to answer and go very

(Testimony of Captain R. Sandstrom.)

slowly and by that time she is sagging; she is going down all the time; there is motion there all the time; she would be probably making about ten and a half knots or around that neighborhood, I would imagine. That is what their speed is as a rule.

Q. All pilots are familiar with the effect of suction on the stern of a vessel, are they not, if they go too close shore?     A. Yes, sir.

Q. And a navigator electing to go between the vessel at anchor and the shore under the circumstances outlined in the questions which have been asked you would take a chance on suction would he not?

A. Yes, he is figuring, ordinarily figuring, he would figure everything was clear going down on that side.

Q. But you have testified that under the circumstances outlined in the questions asked you it would be possible for a navigator of a down vessel, the "West Keats" in this instance, to determine the position of the "Boston Maru" at a point twenty-one hundred and fifty feet upstream from the "Boston Maru"? [174]

A. Approximately.

Q. Now, the navigator would know, would he not, that in coming down between the "Boston Maru" and the Oregon shore there would be danger of suction?     A. If he got too close, yes.

Q. And if suction did occur the effect would be to sheer the bow of the vessel off to starboard, wouldn't it?     A. Yes, sir.

(Testimony of Captain R. Sandstrom.)

Q. And pull the stern towards shore?

A. Yes, sir.

Q. And that sheer would be a pretty strong force, wouldn't it?     A. Yes, sir.

Q. How far would you say a vessel would have to run in order to get the better of a sheer of that sort of a vessel under control?

A. That would depend on the vessel and her rudder power.

Q. A heavy vessel would navigate a greater distance without getting under control, wouldn't it—would run a greater distance?

A. Yes, because they are slower to answer.

Q. The suction cuts no figure—the suction of the shore cuts no figure unless the stern gets close to shore, does it?

A. Not as long as there is deep water under her, it wouldn't have no effect unless she gets within a certain radius; some vessels have a displacement that they will suck at a greater distance than others and that depends a great deal on the model of their sterns.

Q. Depends to some extent on the speed of the vessel too, doesn't it?     A. Yes, sir.

Q. The suction is greater if the vessel is going at high speed than if the vessel is going at low speed, isn't it?

A. If you are in a narrow channel, yes.

Q. Is it possible for suction to influence the navigation of a vessel as long as the vessel is headed

(Testimony of Captain R. Sandstrom.)

towards shore, or headed nearly [175] towards shore?

A. No, it couldn't; couldn't influence at that time because it wouldn't be close enough to feel the suction.

Q. You have been familiar with the plat, this "West Keats" Exhibit No. 1, for two years or more, haven't you? A. Yes, sir.

Q. And this exhibit has been on file in the office of the Columbia River pilots during that length of time, hasn't it? A. The chart has?

Q. Yes, the chart from which this blue-print has been made?

A. I believe so. I am not sure; I am not positive but I believe it has.

Q. It is easier to turn a vessel at slack tide than at ebb tide, a vessel going down stream?

A. To swing her?

A. Yes.

A. Yes, it would.

#### Redirect Examination.

(Questions by Mr. SNOW.)

A vessel of the type of the "West Keats," under what condition as to speed does she steer better?

A. Well, she has—to get an effect on her rudder at all you have to have practically full speed on her to get any results, or quick movement. When they are going slow they don't answer very readily. They have a lugging condition that I don't know whether—it is probably in the small rudder or the

(Testimony of Captain R. Sandstrom.)

steering-wheel. They have what we call electric telometer and they are very uncertain and sometimes the contact point will miss and she won't go hard over, or sometimes it will blow out, so they are always an uncertain quantity, and we are always a little bit afraid of them.

Q. Assuming the steering-gear is operating well and throwing the rudder hard over, or part way over, as the order may be, how does she [176] steer best, under full speed or half speed?

A. Under full speed. All vessels steer best under full speed almost if they are in good order.

Witness excused.

Whereupon proceedings herein were adjourned until ten o'clock to-morrow morning. [177]

TESTIMONY OF CAPTAIN E. D. GRUNSTAD,  
FOR THE GOVERNMENT.

Captain E. D. GRUNSTAD, a witness called on behalf of the "West Keats," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

You are a Columbia River pilot, Captain Grunstad? A. Yes, sir.

Q. You belong to the Association? A. Yes.

Q. How long have you held your United States license for the Columbia River?

A. Fifteen years.

(Testimony of Captain E. D. Grunstad.)

Q. How long have you held your state branch?

A. Five years.

Q. How long have you been actively engaged in piloting? A. Five years.

Q. What was the nature of your employment before you were a pilot?

A. I was with the United States Engineers on survey boat.

Q. How long were you with that survey boat?

A. Five years.

Q. What surveys did you make?

A. All along the Columbia River from the Columbia River Lightship to Portland.

Q. Are you familiar with that part of the Columbia River opposite Columbia City, above and below there? A. Yes, sir.

Q. Is there any anchorage ground in that vicinity?

Mr. McCAMANT.—I think that is a conclusion, your Honor. I think this witness ought to be asked what is the customary way of anchoring vessels.

COURT.—Yes. You don't mean designated anchorage ground?

Q. I don't mean designated by law; I mean designated by custom. Is there any customary anchorage ground in that vicinity? A. Yes, sir.

[178]

Q. Where is it, Captain?

A. Abreast of Columbia City.

Q. Front or rear? A. Well, front.

(Testimony of Captain E. D. Grunstad.)

Q. Abreast Columbia City or down?

A. Yes, Columbia City Ranges—what is called the Columbia City Ranges.

COURT.—What do you refer to as the Columbia City ranges, Captain? On the Columbia City side?

A. Yes, direct in the channel down to Columbia City.

Q. Is that customary anchorage ground nearer the Oregon bank or nearer the Washington bank?

A. Nearer the Washington.

Q. How do you ordinarily anchor a vessel at that place at night, assuming it is clear and you can see lights? Not assuming fog, or anything where you can't.

A. Well, set by the ranges, red ranges that we use to anchor on, and abreast of Columbia City range.

Q. Abreast of Columbia City range lights?

A. Yes, sir.

Q. I will hand you a blue-print here, U. S. Engineer's blue-print, that is marked "West Keats Exhibit 1," and will ask you to point out the red range to which you have just testified.

A. Red range on this dike, the end of this dike.

Q. Is that dike marked 28-2?

A. That was before it was extended; direct line down takes about fifteen hundred feet off the Columbia City, near the Washington shore; here is the intersection of the line.

Q. Now, the other light of that range is which one, Captain?

(Testimony of Captain E. D. Grunstad.)

A. The red one you have reference to?

Q. The other light of the red range.

A. Here, the end of the jetty, the St. Helens jetty; it is the one with spur up here.

Q. No. 27-2? A. Yes, sir.

Q. I am referring to two years ago, October 1924. And it is [179] *that* there have some changes been made since that time. I understand you are testifying as of two years ago? A. Yes, sir.

Q. Have you anchored any deep draft vessels at that place, ever, Captain? A. Yes, sir.

Q. What is the deepest draft vessel you recall having anchored there?

A. I anchored a Jap one night, drawing twenty-nine foot four.

Q. I direct your attention to a place shown on the map as—close to that anchorage in which there is a sounding of twenty-five feet shown, and an indication of an area of shoaler water than the rest of the river there? A. Yes.

Q. And will ask you whether that interferes with that place of anchorage that you have just described? A. No, sir.

Q. Why not, Captain?

A. Well, you have a thousand feet clearance after you anchor on that particular range, on the Washington side.

COURT.—You mean a thousand feet before you reach the twenty-five foot area?

A. Yes. Here is the front range here, and—



(Testimony of Captain E. D. Grunstad.)

COURT.—You say a thousand feet from there over to here?

A. Yes, over to that twenty-five foot.

Mr. KING.—In order that the record may show that, you mean from the intersection of these two over to the edge of the shoal?

A. No, to the twenty-five foot sounding.

Mr. KING.—Over to the twenty-five foot sounding?

A. Yes.

Q. Where the figure “25” appears within that dotted line of the shoal? A. Yes, sir.

Q. Mr. KING.—You say that is a thousand feet? [180]

A. This dotted line, every dot means a fathom, so is thirty feet in this area around there. Every little dot on this circle denotes a fathom.

Mr. KING.—How far do you say from the intersection of these two lines to the figure “26”?

A. That is about six hundred feet.

Mr. KING.—Six hundred feet?

A. Yes.

Q. What is the character of the water just below the place of intersection of these two lines to which Mr. King calls attention? A. Deep water.

Q. Deep water? A. Yes, sir.

Q. Where is the ship’s channel, main ship channel, at that part of the river opposite Columbia City? A. It follows the Oregon shore line.

Q. Are you familiar with the “West Keats” and with other Shipping Board vessels of her type?

(Testimony of Captain E. D. Grunstad.)

A. Yes, sir.

Q. Eighty-eight hundred ton vessels?

A. Yes, sir.

Q. In piloting a vessel of the "West Keats" type down the river at that point, assuming she is fully loaded, how would you run that part of the river under ordinary circumstances at night?

A. I would follow the same old course along the Oregon shore.

Q. What range lights, if any, would you use?

A. Well, we have no range lights after we leave the Columbia City or St. Helens ranges.

Q. Follow the St. Helens range would you?

A. Yes, follow the St. Helens range, and when you leave that you follow the Oregon shore line down until you intersect with the Columbia City ranges.

Q. And then follow the Columbia City range on down? A. Yes, sir. [181]

Q. Pick it up in the rear? A. Yes, sir.

Q. I wish you would describe the character of that, whether there is visibility, and with special reference to whether the bank is high or low at that point.

A. Well, very deceiving on dark night on account of the high bank, which throws a shadow across the water there.

Q. I wish you would show the Court on that chart just where the high bank is?

A. Along the Oregon shore line, here. This is high bank all the way down.

(Testimony of Captain E. D. Grunstad.)

Q. You are pointing generally to an area on which the four range lights are situated?

A. Yes, sir.

Q. The shadows of that bank, you say, fall upon the waters? A. Yes, sir.

Q. What do you mean by deceptive?

A. Well, very deceiving; you can't see the shore line.

Q. Does it have any effect on ability to judge distance there? A. Yes, it has.

Q. Make it easier, or harder? A. Harder.

Q. Now, assume a vessel of the "West Keats" type coming down the river on a night which is very dark and cloudy, overcast but not foggy, and the visibility clear as to lights—visibility good as to lights, and assuming another vessel four hundred feet in length anchored approximately at the place shown as, "Position at collision," on this chart, at what point above the position at collision would you say is the furthest or earliest point at which the distance of that anchored vessel from shore might be ascertained?

A. Well, you have to—you would have to get down in the vicinity of about two thousand feet away before you could determine the exact location of the anchored vessel. [182]

Q. Now, might that distance be greater or lesser, depending on the darkness of the night?

A. No—well, of course, a dark night you would have to get closer.

Q. On a fairly—on a night that is not very dark

(Testimony of Captain E. D. Grunstad.)

could you tell that distance much before two thousand feet?   A. Not very much, no.

Q. Is there a reason for that, Captain? I presume there is. State the reason.

A. Well, you have to get down close enough to the Oregon shore line to line up the other line—the Oregon shore line, before you can see down through the waters below.

Q. How would you estimate the distance of the anchored ship from shore, by looking between her and the shore?   A. Yes, sir.

Q. And noting the water between her and the shore?   A. Yes, sir.

Q. And then making your estimate?

A. Yes, sir.

Q. Would the shadow cast by the Oregon bank, high bank at that point, affect such estimation of distance?   A. Oh, yes.

Q. In what way?

A. Why, such a darkness along the shore line that you couldn't see the shoreline, or you couldn't see open waters between the ship.

Q. In your judgment could there be a situation in which the night was so dark, although clear, that you couldn't see the water at all until you got down very close?   A. Yes, sir.

Q. So it just depends on how dark the night is, does it, Captain?

A. If the pilot on the "West Keats," under the conditions outlined in the preceding question, should be able to observe at approximately two

(Testimony of Captain E. D. Grunstad.)

thousand feet distance, that the "Boston Maru" was anchored so close to the shore as to make passage between [183] the "Boston Maru" and shore—

A. I didn't quite get the first of that.

Q. If under the conditions named in the preceding questions, the pilot of the "West Keats" was able to observe at a distance of two thousand feet approximately, that the "Boston Maru" was so close to the Oregon shore as to make passage between the "Boston Maru" and the Oregon shore dangerous, could the pilot, under those circumstances, effect an easy or ordinary turn to pass on the Washington side?

A. It would be rather dangerous, would be rather abrupt for a heavy loaded vessel.

Q. Why?

A. Why, coming up that speed with a loaded vessel, you have got to stop and back then, and you have no control of them, back them full speed, they run out of the channel.

Q. How does a vessel—at what speed does a vessel like the "West Keats," fully loaded, steer best?

A. Full speed.

Q. What is the reason for that?

A. Why, you have—some vessels steer very badly if they are slow, and the more kick you get from the propeller on the rudder the better they steer. If you are going at slow speed you have to put your rudder hard over in order to have the same effect.

(Testimony of Captain E. D. Grunstad.)

The speed through the water is what makes them steer better,

Q. Now, if the pilot on the "West Keats," under the circumstances we have just outlined, discovered closer than two thousand feet that the distance was very short between the "Boston Maru" and the Oregon shore, and he attempted to stop and back his engines, what would be the probable result of that? A. Well, he would run aground.

Q. Any other possibilities? [184]

A. Well, there is sometimes the ship will come the opposite way to the propellers, and the chances are he will hit the Jap ship midships or go on the shore on the Oregon side; but as a rule they will act on the propeller finally and run out of the channel.

Q. Would it be safe for the pilot of the "West Keats" to throw out his anchor under those conditions? A. Absolutely not.

Q. Describe how you would bring a loaded vessel like the "West Keats" to a stop at a speed of eight and eighty-four hundredths, assuming you had as much time as you needed to execute the maneuver safely, stop and turn and anchor?

A. You mean slack water?

Q. Slack water.

A. Well, he ought to have a distance of two miles to slow down and stop and let it drift in order to anchor in a position which you want her to take.

Q. You would want two miles? A. Yes, sir.

(Testimony of Captain E. D. Grunstad.)

Q. What would you do?

A. I would slow down, stop, and such time as they don't steer you have to get them a little slow head, the helm over, in order to keep them in the channel, until you get down to the particular place you want to anchor. Stop—as long as they steer you stop them, and when they begin to go out of the channel you put your wheel over and give them a slow head occasionally.

Q. What would be the idea of giving a slow head occasionally?

A. So you get some response from the wheel, make her steer.

Q. Get some water against the rudder?

A. Yes, sir.

Q. If your vessel begins to get out of hand and doesn't steer well you will put her slow ahead in order to make her steer? A. Yes, sir. [185]

Q. To turn her?

A. As soon as she answers the helm stop her again, in order to keep her from gaining momentum.

Cross-examination.

(Questions by Mr. McCAMANT.)

Captain, you say that—suppose now you are two thousand feet away from a vessel; you have to—in order to escape her you have got to make a star-board turn so as to cover four hundred feet at the end of the two thousand feet; you say you can't deflect a vessel four hundred feet in running two thousand feet? A. No, sir.

(Testimony of Captain E. D. Grunstad.)

Q. When she is steering well?

A. No, not in two thousand feet; no, sir.

Q. There is a customary anchorage ground in the neighborhood of Columbia City that is known to all the pilots, isn't there?    A. Yes, sir.

Q. And it is customary for vessels desiring to go in to St. Helens to anchor there, isn't it?

A. Yes, sir.

Q. And all of the pilots on the river know that?

A. Yes, sir.

Q. Do all the pilots anchor at the same place at Columbia City?    A. Yes, sir.

Q. They all do?    A. Yes, sir.

Q. You never have seen a vessel anchored there except at the place you have indicated in your direct testimony?    A. No, sir.

Q. Is that true?    A. Yes, sir.

Q. When you anchor a vessel there, before the tide comes in, when the wind is negligible, is it possible for you to tell in advance which way the vessel will swing?    A. Not always, no, sir.

Q. Can you ever tell, when there is no wind?  
[186]    A. Sometimes can.

Q. That is where there is a strong current moving at the place?    A. Yes, sir.

Q. Is there a strong current by Columbia City?

A. No, sir, there isn't. In low, on a flood tide—

Q. Yes, I understand the effect of the tide; but suppose you anchor while the tide is ebbing?

A. Yes, sir.



(Testimony of Captain E. D. Grunstad.)

Q. Is there any way of telling, unless there is a wind blowing, considerable wind blowing, is there any way of telling which way a vessel is going to swing?

A. Depends on which way the wind is blowing.

Q. I asked, no appreciable wind?

A. Then she would swing toward the Oregon shore.

Q. In the absence of wind you say a vessel would always swing toward the Oregon shore? A. Yes.

Q. You spoke of anchoring a Jap vessel there, didn't you, on your direct examination?

A. Yes, sir.

Q. Did that vessel swing toward the Oregon shore?

A. That particular time it was freshet and there was no upstream current.

Q. Did she swing toward the Oregon shore?

A. No, sir, she trailed downstream all the time.

Q. Were you there when the tide flooded?

A. The tide don't flood at that particular time of the year.

Q. How much below water was it?

A. About five feet above low water.

Q. Captain, would it be regarded as good seamanship for a pilot to anchor a vessel so close to the shoal marked opposite Columbia City, as that his vessel, if she swung towards the Washington shore, would swing on to that shoal if his vessel drew upwards [187] of twenty-six feet?

(Testimony of Captain E. D. Grunstad.)

A. If he anchors on the intersection of these red ranges, on these red ranges, and the intersection of this line, he has clearance from the shoal.

Q. If he anchors at the point where these two lines converge on the red range, the red range and the other range running up to St. Helens courthouse? A. Yes.

Q. And his vessel swung—his vessel is four hundred feet in length, and he put out thirty fathoms of chain, suppose his vessel swung towards the Washington side, made a complete turn going upstream, would you still say he would have plenty of clearance to clear that shoal? A. Yes, sir.

Q. When a vessel swings at her anchor on flood tide, how does the flood tide affect her?

A. When swings, riding practically up and down on the anchor chain until she has swung completely around, and the current will of course set her back on the chain.

Q. She rides up over her chain, does she?

A. Yes, while she is swinging.

Q. You testified, didn't you, at the investigation held by the Steamboat Inspectors, growing out of this particular collision? A. I beg pardon?

Q. You testified before the Steamboat Inspectors at the investigation which followed this collision, didn't you? A. Yes, sir.

Q. Did you say—

Mr. SNOW.—I object to that, because I understand it refers to a preliminary investigation which I understand is a secret investigation.

(Testimony of Captain E. D. Grunstad.)

Mr. McCAMANT.—The testimony is under oath, and I presume if I can get a copy of it I can ask the witness if he so testified. [188]

COURT.—I don't know whether secret any more. It seems to me the rules have been changed recently.

Mr. McCAMANT.—We were able to get a copy of this, which we were not able to do years ago.

COURT.—In some admiralty case tried a short time ago, it was stated the rule had been changed in the department now, and the preliminary investigation is not secret. I don't know whether that is a fact or not.

Mr. SNOW.—I understand, your Honor, that has always been the department rule, and I didn't know of a change.

COURT.—I don't know, but it was so stated in some admiralty case here recently. In any event counsel has a copy of it, so I suppose he can ask about it.

Q. I will ask you whether you testified on that occasion as follows: "Do you ever pass vessels at anchor at that particular point"—referring to the point marked on the chart for the anchorage of the "Boston Maru."

Mr. SNOW.—Now, your Honor, I don't know that that refers to that, in that testimony, but it speaks for itself. I object to counsel's construction.

Mr. McCAMANT.—All right, we will show it refers to this particular anchorage. I will ask

(Testimony of Captain E. D. Grunstad.)

about the testimony first, and then we will analyze it.

Q. Did you testify as follows on that occasion: "Do you ever pass vessels at anchor at that particular point? A. Yes. Q. Night-time and dark? A. Yes, sir. Q. Ever stop your vessel when you passed? A. Yes, sir. Q. Go straight ahead full speed ten miles? A. Yes, maybe. Q. When she is straight up and down the channel? A. Yes. Q. When one is diagonal across the channel, ever pass that way? A. No, sir." Did you so testify? [189] A. Yes, sir.

Q. Did you also testify on that occasion as follows: "If you were going down in same vessel and saw one diagonally across the stream, would you stop your vessel? If saw it in time, and there was room, say you saw her four or five minutes ahead of you? A. I would if I thought I couldn't get by. Q. Even if you couldn't get by, your first impulse is to stop? A. Yes, sir." Did you so testify? A. Yes, sir.

Q. Are you still of that opinion? A. Yes, sir.

Now, prior to the time when these questions were asked you on that hearing, you had been advised of where the "Boston Maru" was anchored, had you not, by previous testimony? A. No, sir.

Q. You were not? A. No, sir, I was not.

Q. Were you asked these questions: "Suppose a vessel four hundred feet long, with thirty fathoms of chain out, and anchored seven hundred feet from

(Testimony of Captain E. D. Grunstad.)

shore, would swing slightly on a flood tide towards the Oregon side, would she obstruct the channel?

A. Only would have two hundred fifty to three hundred feet. Q. Would it be safe for a vessel

drawing twenty-six or twenty-eight feet of water to go between that vessel at anchor and the shore, going ten miles an hour? A. No, hardly." Did you so testify? A. Yes, sir.

Mr. SNOW.—I object to that, because these questions don't follow each other in their order, and counsel has read one question from one place and one from another. I don't know what the witness had in his mind at each one of these questions.

COURT.—Well, we can find out if necessary.

Mr. SNOW.—This is not the investigation that these questions are being read from. It is the trial of one of the [190] pilots, I don't know which.

Mr. KING.—It is the hearing of November 7th.

Mr. SNOW.—Was in the preliminary investigation.

Q. There was a chart before you at the time, wasn't there, when that testimony was given, Captain?

A. I don't remember as it was; in fact, at that time I didn't know anything about the exact location of where the Jap ship was anchored.

Q. You are still of the opinion that if the space between the stern of the "Boston Maru" and the Oregon shore was two hundred and fifty feet, that it would not be safe for a down-coming vessel drawing

(Testimony of Captain E. D. Grunstad.)

twenty-six to twenty-eight feet of water, to attempt to go between her and the Oregon shore, are you?

A. Not a dark night; no.

#### Redirect Examination.

(Questions by Mr. SNOW.)

Judge McCamant asked you some questions in relation to the difficulty and danger involved in a turnout past the bow of the "Boston Maru" from a distance of two thousand feet, and as I understood it, you described such a turn as dangerous.

A. Yes, sir.

Q. If such a turn were attempted, however, would the pilot attempting it have to take into consideration, or take in account the anchor chain of the "Boston Maru"? A. Yes, sir.

Q. Would he know in what position the anchor chain would be?

A. Well, it would be leading out from the bow of the ship.

Q. Could he tell at what angle it would lead out?

A. Why hardly, no; I don't imagine that he could; that depends on the current and the draft of the vessel, and the wind.

Q. Now, did you intend to say on your examination that such a turn would be impossible, or merely that it would be dangerous? [191]

A. It would be impossible.

Q. You don't think it would be possible?

A. No, sir.

(Testimony of Captain E. D. Grunstad.)

Recross-examination.

(Questions by Mr. McCAMANT.)

You spoke on your direct examination, first direct examination, Captain, about a channel. You don't mean to say that there is any harbor regulation fixing a channel at that particular point, do you?

A. No.

Q. And there are no ranges opposite Columbia City after you leave St. Helens range, until you get further down the river, are there?

A. No, sir.

Q. The chart shows that there is deep water until you come to this shoal to which I direct your attention, doesn't it?      A. Yes, sir.

Q. And the pilots are all familiar with this chart, aren't they?

COURT.—Captain, if the pilot of a vessel coming downstream should observe ahead of him, a mile and a half ahead of him, a vessel anchored down by Columbia City, and her anchor lights should show that she was lying athwart the channel, would he have any means of determining from the range lights down here, the probable location of that boat?

A. No, sir.

COURT.—Couldn't tell?

A. No, sir.

COURT.—Q. The range lights would be no aid to him?

A. No, sir.

COURT.—Are there any range lights down the river below her?

(Testimony of Captain E. D. Grunstad.)

A. Not until we get the Columbia City ranges on the stern going down. [192]

COURT.—I mean on the Washington shore.

A. There is, way down here.

Mr. KING.—This shows it further down, different conditions. (Taking another map.)

A. The low ranges don't show on this chart.

Mr. KING.—This is "Boston Maru" Exhibit "L."

### Redirect Examination.

(Questions by Mr. SNOW.)

What lights are there below the place of collision, the first lights? A. Columbia City ranges.

Q. Below that, Captain?

A. There are some lights on the jetty down below, what we call Caples Point.

Q. How far are they?

A. They are about four or five thousand feet.

Q. Are they on the Oregon side or the Washington?

A. On the Washington side. They are not visible from the upper stretch coming down to Columbia City.

Q. Not visible from the stretch of water above Columbia City? A. No, sir.

Q. What aid would they be, if any, to the pilot of the "West Keats" in determining the distance of the "Boston Maru" from the Oregon shore?

A. None whatever.

Witness excused. [193]



(Testimony of R. S. Kimberk.)

Mr. SNOW.—We have entered into a stipulation which I understand is as follows, but Mr. Hixon, a witness who has already testified, if recalled, would testify that the gravel forming the shoal place on the chart to which we have referred, having in the center the sounding of twenty-five feet, opposite Columbia City range light, was dumped in there by dredge, as shown by the records in his office, August 6th to August 14th, 1921. Is that your understanding, Mr. King?

Mr. KING.—That is my understanding. All right. [194]

#### TESTIMONY OF R. S. KIMBERK, FOR THE GOVERNMENT.

R. S. KIMBERK, a witness called in behalf of the "West Keats," being first duly sworn testified as follows:

##### Direct Examination.

(Questions by Mr. SNOW.)

You are one of the officers of the Columbia Pacific Shipping Company, are you?

A. Yes, sir.

Q. That is the managing agent of the "West Keats"? A. Yes, sir.

Q. What efforts, if any, have been made by the Columbia Pacific Shipping Company to secure the attendance at this trial, or to take the deposition of the lookout on the "West Keats" at the time of this collision with the "Boston Maru"?

A. We have exhausted every source of informa-

(Testimony of R. S. Kimberk.)

tion that we know of, since the middle of last spring, until this morning.

Q. Name some of the places you have communicated with?

A. We have inquired through the Seamen's Service Bureau of this city, where we learned that he had joined the steamer "William A. McKenna," on May 15, 1925; we communicated with the owners of the steamer "William A. McKenna" at their home office, Boston, who advised us that he was on that vessel from May 15th to June 11th, 1925; from that date they had no record of him whatsoever. We also learned that his address while in this city was at the Albany Hotel on Second Street, whom we wrote to and communicated with, but had no record of the man whatsoever as being at their hotel any time during May, 1925. We communicated with the Seamens Union of the Pacific, at this city, but had no record of the man. We thereupon communicated with the Seamens Union of San Francisco, who said that they had the name of Lars Olsen on nine different cards, indicating that there were nine different men of that name, and it would be very hard [195] to determine just which one he was. We told them to investigate all of these men and endeavor to locate the man in mind. There has been no development since that time.

Cross-examination.

(Questions by Mr. McCAMANT.)

The man's name was Olsen?

(Testimony of R. S. Kimberk.)

A. Lars Olsen.

Q. Well, he went with the "West Keats" over to the Orient after this collision, did he not?

A. As far as I know.

Q. And came back to Portland at the end of that voyage, didn't he?     A. Yes, sir.

Q. When was the "West Keats" in Portland after that voyage to the Orient?

A. About in March, 1925.

Q. March, 1925. And this lookout Olsen was with the vessel when she reached Portland at that time?     A. As far as I know.

Q. That is all. The record will show that this litigation was pending at that time, and deposition could have been taken.

Witness excused.

Mr. SNOW.—I desire to offer in evidence depositions taken on behalf of the "West Keats," being depositions of C. J. Swenson, Lee O. Jetts, Enar Gidlof, E. P. Gillette, and Anton Bergreth.

That, your Honor, is all of our case, except that we have a little bit of testimony to elicit from Captain Berry in the nature of rebuttal, and I think it would be better to pass that until we hear from their witnesses. I realize that the time of the Court is very short, and the Court is unfortunately behind [196] on the docket, and for that reason I don't want to ask the Court to listen to the reading of these depositions, but I would, if possible, like to read the deposition of the second officer who was on the bridge at the time this whole matter

(Testimony of Captain Edward Sullivan.)

occurred; and perhaps excerpts from other depositions. But there is a room full of pilots here now. They are anxious to get back to the river, and if counsel will stipulate we may be able to proceed with the reading of these depositions at some other time.

COURT.—You can read the depositions later. We will take the oral testimony first.

Libelant “West Keats” rests. [197]

TESTIMONY OF CAPTAIN EDWARD SULLIVAN, FOR THE “BOSTON MARU.”

Captain EDWARD SULLIVAN, a witness called in behalf of the “Boston Maru,” being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT.)

Captain, what is your occupation?

A. River pilot.

Q. You have been operating as a pilot on the Columbia and Willamette Rivers for about how long? A. For about forty years.

Q. And are you familiar with the channels and with the courses taken by vessels coming up and down the Columbia River? A. Yes, sir.

Q. Are you a member of the Columbia River Pilots Association? A. Yes, sir.

Mr. SNOW.—I admit the captain’s qualifications, as far as that is concerned.

Q. Does the Columbia River Pilots Association

(Testimony of Captain Edward Sullivan.)

receive the charts prepared by the Government, showing the condition of the river at all times?

A. Yes, sir.

Q. How often are those charts—new charts presented there?

A. These project shoals they are working on, three or four times a year.

Q. I call your attention to “West Keats” Exhibit No. 4, being blue-print chart of the Columbia River at or near Columbia City, and I call your attention particularly to the point marked on that chart as the place of anchorage of the “Boston Maru” at the time of collision. I will ask you to state whether or not that is a place on the Columbia River where the vessels are frequently anchored?

A. Well, in that vicinity I should say yes, that is the usual place. [198]

Q. Is it possible for a pilot to anchor at any particular spot in the river after dark?

A. Well, it is a very difficult thing, I have found from my experience, to drop ahead any particular spot, with the exception possibly with the aid of some range or lights that we use especially for that purpose.

Q. It would only be an approximation, ordinarily?

A. Yes.

Q. What is the customary thing in the matter of going into the docks at St. Helens, with a vessel going downstream from Portland, suppose the river is low and the vessel is drawing a considerable draft?

(Testimony of Captain Edward Sullivan.)

A. Well, at the time, approximately at the time that this thing occurred, why he would wait for the tide, anchor at Columbia City.

Q. Anchor at Columbia City. What has been your own practice in regard to anchoring in that neighborhood? A. I would wait.

Q. As to where you have anchored.

A. Well, I would use the front light of the Columbia City range as a guide, making the turn and using that to show the shore line, and anchor usually abreast of that light.

Q. Would you aim to anchor as near as possible in the center of deep water?

A. Well, would try to. There is nothing on the Washington side to indicate where the shore is. The only thing would be the lights on the Oregon dock—Columbia City side, so the distance would have to be judged—measured with the eye from that point.

Q. Now, I will ask you, Captain Sullivan, whether there is any obstruction of vision from Warrior Rock, at the head of this chart, "West Keats" Exhibit No. 1, and the point marked as the anchorage of the "Boston Maru" at the time of the collision? [199] A. No, not that I know of.

Q. And about how far is Warrior Rock upstream from the place where the "Boston Maru" was anchored?

A. I think it is known somewhere about three miles, perhaps a little more—estimate.

(Testimony of Captain Edward Sullivan.)

Q. You are familiar, are you, with the courses that downstream boats ordinarily take in coming from Warrior Rock down to the point indicated as the anchorage ground of the "Boston Maru"?

A. Yes.

Q. Is there any place in all of that three miles where there is obstruction to vision of the man on the bridge of a vessel which would prevent him from seeing the lights on the "Boston Maru," if anchored at that point?

A. No, not if the night were clear, there would be nothing.

Q. How far above that anchorage ground—that anchorage point of the "Boston Maru," would it be necessary to start in order to deflect a vessel over to the Washington side of the anchorage ground of the "Boston Maru"?

A. I would think in a case of that kind I would want to be a thousand feet away; if I was steering straight for the ship I would want a thousand feet to be safe, to go around her on the other side.

Q. You think if you saw the "Boston Maru" a thousand feet away, it would be possible for you to deflect your vessel to go on the Washington side?

A. I think so.

Q. And assuming that your vessel was drawing twenty-six feet of water?      A. Yes, sir.

Q. I wish you would describe to the Court, Captain Sullivan, what happens when the flood tide begins to act on a vessel at anchor?

(Testimony of Captain Edward Sullivan.)

A. Well, the first thing the ship does it to come up until the [200] chain is perpendicular; the weight holding the chain to the anchor would be relaxed, and the ship would come to a point at which it would be perpendicular.

Q. Up to that point would the vessel swing at all?

A. I would not think so, I don't think so.

Q. Then what would happen? •

A. Then the flood would gradually forge her ahead of that chain until sufficient weight of that bight had accumulated to stop her from going ahead; then of course would commence to swing; that bow would hold there in a measure stationary; she would commence to swing.

Q. Suppose the vessel at anchor is four hundred feet long, and she has thirty fathoms of chain out, and is anchored in forty-three feet of water. What would be the approximate radius of the arc of a circle on which she would swing?

A. I don't believe she would leave that point very far, very much; I don't think would be very much difference.

Q. That is, wouldn't much exceed the four hundred feet?

A. No, I don't think so, at that particular place where the tide is very slow.

Q. Is it customary for vessels operating the Columbia River to put out more than one anchor?

A. I never heard of it, never used it or heard of it.

Q. Are the vessels that operate on the Columbia



(Testimony of Captain Edward Sullivan.)

River equipped with gear to admit putting out ordinarily a stern anchor as well as a bow anchor?

A. Very few; very few of these steamers come here with the stern anchors; never heard of one being used in the Columbia River.

Q. Were you familiar in 1924 with the shoal marked on this map off of Columbia City front range light?

A. Well, approximately. I knew there was a shoal there, in a [201] general way, as generally pilots know it.

Q. It has been testified here that that shoal has been made from the dumping of gravel in the river. If the shoal is made in that way, would the wash of the water—would that tend of itself to disappear, without any Government work?

A. No, I think that shoal has been there all the time. It is a gravel shoal. It is generally known that gravel shoals don't wash away.

Q. I call your attention to the "Boston Maru's" Exhibit "E," being a photograph of the "Boston Maru," showing the condition of this vessel after this collision, and the "Boston Maru" Exhibit "H," being a photograph showing the condition of the "West Keats" after the collision; and I may say for your information that the testimony shows that the "West Keats" was struck at about the hawsepipe on the starboard side of the "West Keats," back of the bow. The testimony indicates that the "Boston Maru" was lying at anchor measurably athwart the channel, more or less athwart the chan-

(Testimony of Captain Edward Sullivan.)

nel, and the "West Keats" was coming down on the St. Helens ranges—had come downstream on the St. Helens ranges to the point marked with the red cross, approximately half a mile above the point of collision. The testimony shows that at that point the order was given by the pilot of the "West Keats" to port, port the helm; his next order was steady, and then there was an order starboard abait, and an order hard astarboard, and following these orders the vessels collided at the point indicated on the photographs. I will ask you what those facts indicate with reference to the course that the "West Keats" was taking with reference to the Oregon shore?

Mr. SNOW.—I object to that question. It is a very long, hypothetical question, but does not contain a statement of all the circumstances. It does not describe the exact distance [202] of the "West Keats" from the bank or from the shoal, and indicate the manner in which the suction would act.

COURT.—Counsel is only asking as to the impact.

A. Well, it would appear from the way the damage to these two ships is, that either the Jap ship was not swung across the channel, or else that the other ship was not pursuing a course straight down the river.

Q. Assuming that the Jap ship was athwart the channel, which end of the "West Keats" was closest to the Oregon shore, judging from the place where the impact occurred on the two vessels?

(Testimony of Captain Edward Sullivan.)

A. I would think that the bow would be nearer to shore than the stern.

Q. Would the fact that the blow was a glancing blow in any manner affect your judgment?

A. I don't quite understand what you mean by a glancing blow.

Q. Let us assume, in addition to the facts to which I have called your attention, that the "West Keats" was going full speed ahead up to one minute before the collision, and that she was making over the land eight and eight-tenths miles per hour, and that the blow was a glancing blow. Would that alter your judgment as to the course that the "West Keats" was pursuing, as to whether her bow or her stern was closer to the Oregon shore?

A. Glancing blow, as I understand, would mean a blow that the ship would glance off; instead of pursuing her course and striking there, she would be on a swing and glancing off, is what you mean?

Q. Yes.

A. Well, I don't see what would prevent the "West Keats" from going bow on to the beach, if that was the case.

Q. Now, Captain, will you tell us how suction acts, what effect the suction has on a vessel, and how it acts, and, as far as [203] the effect of the shore is concerned, how far out it extends?

A. Well, of course how far out it would be would be a question perhaps a pilot wouldn't have sense enough to answer, take more of an expert. The suction is at the stern of a ship; in passing a shoal

(Testimony of Captain Edward Sullivan.)

it is the stern of the ship that sucks towards the shore, not the bow, and of course the stern going towards the shore, the bow naturally goes in the course in which the suction is causing the ship to draw, and we say that she runs away from shore. The fact of the matter is, that the stern is drawn toward the shore by this action, probably by the propellor, being the largest moving object around, displacing the water, and the bow following the course that the suction has caused this bow to draw. Of course if she is moving—the faster she is moving the faster she will go off in that direction; the faster—the further the influence would be on the suction.

Q. The faster the vessel is going, the greater the influence of the suction?   A. Yes, sir.

Q. Would you say, if the stern of the vessel is a hundred and fifty feet out from the shore, the vessel is going eight and eight-tenths miles per hour over the land, that suction would influence her navigation?

A. Well, that would be a technical question. A man perhaps has been in no position to observe a condition of that kind; it might, probably would; it might not. I think a hundred and fifty feet—wouldn't have much influence on the shore a hundred and fifty feet away; would depend perhaps on the nature of the bank, whether it was sloping or steep.

Q. Are you familiar with the bank of the river at Columbia City?   A. Yes, sir.

(Testimony of Captain Edward Sullivan.)

Q. Immediately above the point of collision?

A. Yes, sir.

Q. How is the bank there? [204]

A. Generally straight up and down.

Q. Would that make the suction more or less?

A. I would think it would make it less.

Q. If the vessel is influenced by suction it will cause her bow to sheer off, will it not?

A. Yes, sir.

Q. Away from shore?      A. Yes, sir.

Q. And with considerable force?

A. Well, sometimes, depends on the speed of the ship and the nearness of the shore.

Q. Does it ordinarily take a good while to get a ship under control if she sheers as the result of suction?

A. Yes, very often; be probably a long distance before she is under control; serious problem to the pilot of a ship, going up close to shore.

Q. And would she be under control at all during the time she was influenced by the sheer in her navigation?      A. No.

Q. Are there any range lights at Columbia City which will enable the pilot navigating a down coming vessel, to determine how far an anchored vessel is off the shore?

A. Well, the front light of the St. Helens bar range is in the water—in the edge of the water on a piling; the front light of the Columbia City range is very near to the water, perhaps fifty or sixty feet from the water, the edge of the water. Those are

(Testimony of Captain Edward Sullivan.)

the two lights that are used to determine the shore lines on the St. Helens side or the Columbia City side—the Oregon side.

Q. And is it possible to determine the shore by the aid of these lights, at night?

A. Be impossible.

Q. How far—assuming that the sky is overcast, but the visibility is good, and a vessel is anchored at the point indicated as the anchorage ground of the “Boston Maru,” how far upstream would you [205] have to be in order to determine approximately the position of the “Boston Maru” with reference to the Oregon shore?

A. Well, that would be a question that a man couldn't answer with any degree of accuracy, because perhaps he never had observed such a point, and I don't know.

(Cross-examination.)

(Questions by Mr. SNOW.)

You wouldn't want to estimate, Captain, what distance upstream a pilot would have to be in order to estimate the distance of the “Boston Maru” from shore, if she is in approximately that anchorage?

A. No, I wouldn't.

Q. You would be very uncertain, then, as to the amount of aid you would receive from the front Columbia City range light, of which you spoke just now, would you?

A. Well, have to determine by the light on the ship, wherever that—whatever position he was that

(Testimony of Captain Edward Sullivan.)

night, and it would depend on the conditions and position that she was in, and how much previous attention he had given to it; that light on the stern of the ship and light on the shore would give him an idea of the distance between, the space there was left there.

Q. You would be very doubtful about the amount of aid given you by the front Columbia City range light in estimating the distance from there to the ship, would you?

A. Oh, yes, that wouldn't give you very much idea.

Q. In fact, could you see that Columbia River—

A. Columbia City range light—front light?

Q. Columbia City front light.

A. Oh, yes, that is visible almost from the time you leave Warrior Rock—no, I beg pardon—yes, the Columbia City front light would be shown.  
[206]

Q. That is the lower of the two Columbia City range lights?

A. Yes, that is the outside one—

Q. Isn't there a screen back of the Columbia City front range light?

A. I don't think such as would obstruct from up the river; I don't think so.

Q. You are not sure whether you could see that light from up the river, when it comes right down to it?

A. No, the fact of the matter is, I am not; but I judge from the direction you are going to it, cross-

(Testimony of Captain Edward Sullivan.)

ing to Columbia City—crossing diagonally across the river along the St. Helens dike, and I wouldn't positively say whether that light is visible or not, the front light of the Columbia City range.

Q. Now, a pilot coming down the river and trying to estimate the distance of the "Boston Maru," anchored in approximately the location shown by "West Keats" Exhibit No. 1, which you have in your lap, would find his difficulty increased or decreased according as to whether the night be very dark or not very dark, wouldn't he?

A. Well, the darkness I wouldn't think would affect it, but hazy and smoke around there very seriously affect it, and usually that place is a smoky place, known to be to pilots and others interested.

Q. There is a very high bank on the Oregon side there, isn't there?

A. Yes, quite high; Columbia City is quite high.

Q. Doesn't that bank darken the river at that point?

A. No, not materially I wouldn't think; but the river bank—the river itself is not visible in the night, it is only the light which the pilot goes by; he don't judge the distance from shore by what he can see; he uses bearings of other things.

Q. He would only have—a pilot, judging the distance of the [207] "Boston Maru" from the bank, would only have the stern light of the "Boston Maru" to line up against any that he might find on the Oregon shore?

A. Absolutely all.



(Testimony of Captain Edward Sullivan.)

Q. That is absolutely all?

A. No question about it.

Q. And that is very uncertain?

A. He has to measure that with his eye and according to his vision of the light, and various things; he would have to measure that distance with his eye, those two lights. That is all I can say.

Q. As a matter of fact, he might come down within a thousand feet of this vessel without knowing just how far she was from shore, wouldn't he, on a very dark night?

A. He would have to judge from his experience as a pilot about how far that ship was away.

Q. Well, I say he might come down within a thousand feet of her, and still think she was far enough out to get into a safe position?

A. Yes, it is possible he might think that. He might be very easily mistaken in that.

Q. You would not feel disposed to blame a pilot who made a mistake?

A. Certainly not; no criticism to offer of the pilot doing anything of that sort. I have been against too much of that myself.

Mr. McCAMANT.—I object to that.

Q. If the bank is straight up and down it would tend to make the suction less, you say?

A. Well, yes; using what we would call the visibility of the bank, or the bank that shows; if it slopes out under the water why the suction would be greater because the shoal would reach further out.

(Testimony of Captain Edward Sullivan.)

Q. Of course you understand a river has part of the bank under water? [208]

A. I am speaking of the water's edge, of course, as being the bank of the river.

Q. Now at that particular place in the river you have a fairly sloping bank, haven't you?

A. Well, the bank is a gravel bank, steep, not affected by the wash of the river; remains stationary all the time because it is gravel.

Q. I will hand you a pair of dividers and will ask you to measure the distance between the water's edge and the thirty-foot line or five-fathom line, on the foot of the blue-print, and will ask you if it isn't a hundred and fifty feet from the water's edge to the five-fathom line at approximately the place shown as the place of collision?

A. Well, it shows about two hundred feet on this chart at the stern of that ship, presuming that the inner dot mark is the water's edge, and the outer dot mark is the thirty-fathom curve. You are not sure whether the inner dot mark is the water's edge?

A. No, I don't know.

Q. It might be that dotted line?

A. I don't really know how those charts are made, what they do indicate.

Q. What does it show, two hundred feet from the inner dot mark to the outer dot mark?

A. Yes, sir.

Q. That indicates a very sloping bank, doesn't it?

A. Yes, it would indicate that there.

(Testimony of Captain Edward Sullivan.)

Q. With likelihood of pretty heavy suction if you got close to that six-fathom line?

A. Yes, if go in thirty feet of water with the stern of that ship, and was deeper water outside of it, would be quite a suction there I would think.

Q. Captain, you were asked a very long question that involved [209] photographs E and H, and I hand you these photographs again. I understood you to say that, based on these photographs, you thought that the vessels did not collide at right angles to each other, but rather obliquely. Was that the substance of your answer?

A. Yes, this picture will indicate that, I would think, the "West Keats" caught her anchor on this vessel's quarter. The stern of the ship doesn't seem to be damaged.

Q. I place these two little models in front of you, shown as colliding at approximately right angles. Now you move them to the point at which you think they might have collided, as shown by these pictures.

A. Oh, I think something like that.

Mr. McCAMANT.—Let us get that in the record if we can. Is that about forty-five degrees impact?

Mr. SNOW.—We can draw a diagram of that; we can trace it on this paper.

Q. Captain, I wish you would show the Court just what you see in these photographs to indicate to you that the vessels must have collided in that position?

A. This ship was evidently caught by the anchor of this; supposing it was in the hawse-pipe, drawn

(Testimony of Captain Edward Sullivan.)

close up, sticking out—it sticks out some little distance—and these two flukes stick out; they are the furthest thing that stick outside of the ship along on this surface. They evidently caught this ship and they must have caught in this position, I would think; somewhere about here; would indicate that the ship was going something in that direction; and of course the anchor would pull out of place and the impact later on as it pushed in there broke this hawse-pipe; this hawse-pipe stands outside the line of the plates [210] also, and the impact of the whole thing broke that piece of cast iron running from there up the deck; not very strong for that kind of a blow.

Q. What makes you think that the fluke of the “West Keats” anchor was drawn up close to the hawse-pipe at the time of the collision?

A. Well, the usual way.

Q. They are not drawn up there now, are they?

A. No; the whole thing is broken; they couldn't be in that position now; after the collision they couldn't be placed there in the regular place; it is broken.

Q. Isn't it more than likely that the breaking of the hawse-pipe would prevent letting that anchor out to the position shown in the photograph after the collision?

A. No, it might have dragged it out.

Q. You think might have taken it out after the collision and before the photograph was taken?

A. The collision might have dragged it out; im-

(Testimony of Captain Edward Sullivan.)

fact with the sheer of the ship that amount; unless the pawl was on the chain it would drag it over the break; that may have been. I have an idea that the anchor was dragged out of there by the impact of that blow.

Q. Talking now about the starboard anchor of the "West Keats"?

A. Yes, sir, where she was struck.

Q. The port anchor is also hanging out, isn't it?

A. Well, that anchor has mud on it; they have been using that anchor to anchor the vessel recently. Of course this could be no longer used after a collision of that kind, but this one shows to have been in the water quite recently; has mud hanging on it. I am only judging, of course, from what it appears there. I know nothing of the circumstances of the collision. [211]

Q. I note, Captain, on the picture E of the "Boston Maru," there is a large hole just about between where the men are standing, and I understood you to point to that, approximately that location, and to say that you thought that the anchor of the "West Keats" hit about there. Is that correct? A. I would think so.

Q. And you think the force of the blow went from there aft, do you? A. Yes, I would think so.

Q. Of course it must have been from there aft, if the vessels collided in the way you have indicated there, mustn't it?

A. Yes, I would think that the anchor would let

(Testimony of Captain Edward Sullivan.)

go right away and pull out of that hawse-pipe, nothing very much to hold it.

Q. You think that it pulled the anchor out of the hawse-pipe, and that the anchor did this damage from there aft on the "Boston Maru"?

A. No, I don't think that. I think the impact of the two bodies meeting; but I think the first thing that struck that ship was the anchor, but the impact afterwards would roll up these plates as they are.

Q. Captain, if the vessels hit in the way you indicated on the paper just now, how would you account for the damage on the "Boston Maru" forward of that point?

A. I don't know. I don't know what happened after that. I just judge that is the position they hit in.

Q. As a matter of fact, it is a very hard thing to take photographs of two colliding vessels and say just exactly— A. Yes.

Q. —at what angle they met each other, isn't it?

A. Yes. A good deal like X-rays; you can prove most anything by it. [212] But of course a ship flares and spreads out the further back she goes. Here is the narrowest point and the ship flares out, overhangs, so as she went along she would keep getting wider and hitting harder all the time, until it passed the point at which the flare ceased. So it would be very easy to do a lot of damage aside from what the anchor did, as the ship went along.

Q. The "West Keats" might have pushed the "Boston Maru" around part ways, might she?

(Testimony of Captain Edward Sullivan.)

A. Yes, she would, I would think.

Q. How far do you think she would push her?

A. I couldn't answer that question, I don't know; depends on how fair she struck her, and whether the other ship was swinging at the time, or whether she was going straight.

Q. If the vessels hit in the way that you indicated on the paper just now, wouldn't the bulge of the "West Keats'" bow tend to damage the "Boston Maru" badly from the point of contact to the stern, but to leave the forward part of the "Boston Maru" comparatively undamaged?

A. Well, it would depend on how she was swinging.

Q. Don't you think, Captain, it is likely they may have hit a little bit more at right angles than you indicated on that paper?

A. Possibly, of course. It is easy to be mistaken in a photograph. But that would seem to indicate to me that that was the way it was.

Q. When a vessel swings at anchor on an upstream tide or current, you say she tends to ride up on her anchor chain until it is somewhat perpendicular?

A. Yes.

Q. Before she starts to swing? A. Yes.

Q. I suppose you have been on vessels riding at anchor a good deal and have watched the way they have swung to their chains, haven't you? [213]

A. No, a pilot just guesses a good deal of that, approximately.

(Testimony of Captain Edward Sullivan.)

Q. Does he more often anchor a vessel and then leave her?

A. If he was on the ship he wouldn't see it very well. If he was standing on the shore he would see it, but he wouldn't see it very often—very much, and to be observing it closely all the time, he doesn't do it.

Q. It isn't part of his business to do it, is it, particularly?

A. That depends on his individuality and his curiosity and those kind of things. But what I have noticed from the shore, looking particularly in the harbor at Astoria, for instance, the ship always does about that way. Lots of ships anchor close to the docks there.

Q. You have watched them from the docks?

A. Yes, standing on the vessel you couldn't see that, wouldn't give it very much attention; but that is, up there, apparently what they do, from what I have seen of them.

Q. Now, you can't tell how the anchor-chain leads after it is in the water, can you—from the shore?     A. No.

Q. Not very closely?     A. No.

Q. If it is taut, of course I presume you can tell pretty well which way it is leading?

A. Yes, stretched out.

Q. But if it sags and drops fairly straight into the water it will lead almost any direction from there, might it not?



(Testimony of Captain Edward Sullivan.)

A. Of course you judge by the way the tide was when the ship was anchored. For instance, at Columbia City you are speaking about, she was anchored on the ebb tide, or the evidence indicates she was; at the time of night while she would swing around, and the weight of the ship would stretch that chain out pretty well, wouldn't stretch it out very tight, but would stretch it out along the bottom of the river. [214]

Q. That is way off downstream?

A. The weight pulling down, yes, before she would be brought to stop; the chain would be pretty well straightened out from the direction in which the current run, by the weight of the ship.

Q. Now, as the tide started to come in wouldn't the tide at which she commenced to swing on that tide depend on various influences almost too small to calculate at all, just little eddies of water striking her, and eddies of wind and the like?

A. No, I don't think on such a large vessel as that, would have very much influence.

Q. You think any large vessel the size of the "Boston Maru," would swing about the same way?

A. Yes, if she was loaded especially.

Q. Now, after she started to swing would she not tend to pull out on her chain through the action of the water acting broadside on the vessel?

A. I don't see anything that would make her pull out; no reason why she should. It was the volume of water going up the river in a volume or mass, the way the tide rises; it doesn't come in little

(Testimony of Captain Edward Sullivan.)

eddies; it just swells the river, pushes it along, pushes against the current that naturally flows down until it stops the flow; then it starts to push up the river and pushes the ship along with it until she reaches the point at which the chain which is under her, the bight of it, stops her from going; if was a very strong tide, of course would keep riding up on that until perhaps began to pull the anchor; but in a very mild light tide it could stay fairly into a swinging ship; at high tide, or near high tide, she would just move along until that stopped her, and that would hold the bow in place and the stern would swing around; nothing to stop it from doing that—very slow.

Q. The body of water coming down the river has a current, has it? [215] A. Yes.

Q. And when the tide starts to come in the tide meets it coming up the river? A. Yes, sir.

Q. Doesn't that create an eddy or side current?

A. Well, if strong enough; in some places where jetty or obstruction, maybe an eddy.

Q. You never know, do you, which way a vessel is going to swing on her chain? A. No.

Q. Ahead of time?

A. No, governed usually by the wind; generally would.

Q. Will she swing at that anchorage more often towards the Oregon shore, or towards the Washington shore?

A. Most always towards the Washington shore.

Q. Do you know why that is?

(Testimony of Captain Edward Sullivan.)

A. Well, I don't know. Of course—

Q. Do you think anybody does know exactly why it is? A. No.

Q. It is due to various changing eddies of the water, isn't it, as one current meets another?

A. I think it is due to which direction the wind is blowing in.

Q. More apt to be due to the wind, is it?

A. I think so.

Q. If a vessel swings broadside on her chain—broadside to the river or channel, that is, it will be very hard to say just in what position her chain is, wouldn't it, as to whether hanging directly down, or more or less extended, one way or the other? A. Oh, yes, would be no way to tell.

Q. You couldn't do anything but estimate a situation of that kind, could you?

A. The only way that I could say, if I were on board the ship, I would estimate approximately from where the anchor was to the shore, and if I saw as she went around that she reached a point nearer the shore than that should be, I would say she was dragging [216] her chain toward the shore, that is all I would know.

Q. That is the only way you could tell?

A. At night-time, it would be such a poor estimate; it would hardly be worth considering.

Q. And if you were on board the ship and set about to make such an estimate, you might expect to find her either way, either riding directly on her

(Testimony of Captain Edward Sullivan.)

chain, or pulling her chain out one way or another, might you not?

A. I would think she would not—the ship would not pull the chain toward the shore because there would be no reason for it pulling in that direction; one end is held stationary while the other end if free, swings around; nothing to make it pull either way.

Q. But your experience does not teach you she would not pull towards shore, does it?

A. I wouldn't—never took such a thing into consideration. I would just estimate she didn't swing—judge she didn't swing, didn't pull that chain out in that direction. If there was a strong wind or some undue influence, she might do such a thing, but just the ordinary conditions that existed at Columbia City, I wouldn't think so.

Q. Where is the main ship channel off Columbia City?

A. The main ship channel is anywhere between the thirty-foot contour; we call the main ship channel in any part of the river.

Q. At night, what is the part of the river more commonly navigated by pilots?

A. The Oregon side.

Q. You heard the testimony Captain Gronstad gave this morning as to the use of the Columbia City and St. Helens range lights, in navigating up and down the river, didn't you?

A. I don't know whether I was listening or not.  
[217]

(Testimony of Captain Edward Sullivan.)

Q. In coming down the river past Columbia City, would you follow along first the St. Helens bar range?   A. Yes, sir.

Q. Under ordinary conditions at night?

A. Yes, sir, always.

Q. And run out that range to get this turn, and follow the Oregon shore down and pick up the Columbia City range?   A. Yes, sir.

Q. Astern?   A. Yes, sir.

Q. And continue on down the river.

A. Yes, sir.

Q. Where you would find other range lights below?   A. Yes, sir.

Q. And that course would take you a great deal closer to the Oregon bank than to the Washington bank opposite Columbia City, would it not?

A. Yes, very much so.

Q. And that would be your ordinary method of running that part of the river, would it?

A. Always, unless there was something to divert me.

Q. And the ordinary anchorage at that part of the river is considerably more towards the Washington shore, isn't it?

A. No; the ordinary anchorage is anywhere in the channel where the ship will have sufficient swing without striking her stern; considered by any pilot to be the ordinary anchorage for a ship in the Columbia River, anywhere.

Q. Would you anchor out opposite lower Columbia City range light?

(Testimony of Captain Edward Sullivan.)

A. That is the light I usually use if I anchor there in the night-time.

Q. You put that abeam, do you?

A. Yes, start to turn there, or use that in the night.

Q. You have wider, deeper river a little lower down than that? [218]

A. Well, there is nothing to mark it down below.

Q. Not marked down there?

A. No light to mark it; the other light is near the shore, land; that light is the only thing you have to see; the shore line don't show at night.

Q. Now, anchoring there at night, what range light or lights do you use?

A. No range light that I know of.

Q. Now, Captain, let me qualify that question. I don't mean at the present time. As the pilots know, there have been some changes made in there in the last couple of years, notably the extension of the St. Helens jetty. You are familiar with that, of course? A. Yes.

Q. I am speaking of two years ago, in October, 1924? A. Yes.

Q. In anchoring at that place didn't you yourself frequently make use of the red ranges?

A. I never anchored to that red range, as called. It is not a range at all. It is only two jetty lights that happened to come in a row.

Q. It is not a range at all, is it?

A. Never was, never intended for a range.

Q. They just happened to come in a row?

(Testimony of Captain Edward Sullivan.)

A. It was only at one particular point where it could be made to range; I never used it; never had the habit.

Q. You don't use that yourself for anchoring purposes?

A. I never anchored a ship there after it was put in place; never had occasion to anchor it.

COURT.—How long have these red lights been in place?

A. The red light on the lower end of St. Helens jetty has been there a very long time. The other one was built somewhere along that time; I would not say positively, but somewhere about that [219] time, the other one was built.

COURT.—About 1924?

A. Well, possibly; I don't know as to that.

COURT.—One of these pilots has been testifying they used these range lights for anchorage — for anchorage purposes.

A. Well, I will tell you, Judge, my knowledge of that red range, as it is called. It is not a range at all. It happens that two dikes, their lights happen to come in line at a particular point.

COURT.—I know. But some of the pilots have testified here on this hearing that in anchoring vessels down there opposite Columbia City they used these two red guide lights, as they call it, intending to anchor in range of these lights, which go towards the Oregon shore. Now, it is important to know when these two red lights were put in there.

A. Well, they probably were in place at that par-

(Testimony of Captain Edward Sullivan.)

particular time. My knowledge of that range is this: It seems that one of the pilots by accident discovered in anchoring a ship one night down there, where he was afraid the ship was going to swing over on the Washington shore when she swung around—noticed that these two lights come in range at the point he was in; when the ship swung around she cleared the shore and he had forty feet of water under the stern. So he told the other pilots that when these two lights range, abreast of that fish-trap, it is a good place to anchor; but I never happened to anchor a ship there until after that light was moved, and I don't know anything about it, or whether it is or not. Of course moving down the river any distance it would come off the range, but at that particular spot that he described probably they would range, if he said so, but it is not a range, though; not used as a range, or never was intended for a range. Of course if some one has worked [220] that out and discovered those two will range in a certain spot in the channel, and if you go out and find that spot, you can probably anchor a ship there; but I never had occasion to use it, in my experience, until after moved.

Q. Do you know the name of the pilot that made the discovery that those two lights were handy to anchor by at night?    A. Yes, quite well.

Q. Who is it?    A. His name is Chase.

Q. Chase. What is his first name?

A. Harry.    H. L. Harry L. Chase.



(Testimony of Captain Edward Sullivan.)

Q. You believe that he was the originator of the use of those two lights?

A. That is the first I heard of it.

Q. Did he tell you about using the lights?

A. I don't know whether he told me directly or whether I heard it second hand. My impression is he told me directly.

Q. Can you remember pretty definitely what time this was?

A. No, I couldn't; but he would. He would have—he would have a record of it, and the ship he had, and all about it; but I don't remember. It is just an idea that pilots generally, if they find anything that might be of value to others, that they find themselves, they tell them, scatter the knowledge around of anything that might be of importance.

Q. As a matter of fact, you learn the river through that sort of knowledge and through your own experience, rather than through blue-prints, don't you? A. What?

Q. As a matter of fact, you learn the river through that kind of information and through your own experience, rather than through blue-prints, don't you?

A. Oh, no, we use the blue-prints; grab those up the same as you [221] would the morning paper; we want to see them whenever they come out, right away.

Q. How often do they get out blue-prints, the

(Testimony of Captain Edward Sullivan.)

Government get out blue-prints of this particular part of the river?

A. I suppose three or four times a year these sheets come for that place.

Q. Are these blue-prints changed three or four times a year?

A. I tell you. The shoaling of the river is caused by the summer freshets; immediately following the summer freshet they go over these channels on the range, take three or four lines of soundings, make a drawing of it, make a blue-print, and send the pilots copies always. Then later on if they find a shoal that needs dredging they send the dredger there; after the dredging is completed another chart is made, a little more extended, and the pilot gets a copy of that. Then later on they make a finished chart like this; this is a finished chart, taking in the shore line and all of the objects found there, with the distance properly spaced; the other pilots' blue-prints are only field-notes, the rough sketch; this is the finished chart, this is the last thing we get.

Q. These pilots—as a pilot you go up and down the river from time to time and see that work going on, don't you? A. All the time.

Q. And you know what they are dredging and where they are dredging?

A. Yes; of course we couldn't tell just where began, because we might not happen to be there at that period; but approximately that time.

Q. And so you know about what to expect when the blue-print comes out, don't you?

(Testimony of Captain Edward Sullivan.)

A. Pretty near.

Q. Now, they are continually adding new lights to the river, aren't they? [222]

A. By these dikes they are; wherever they put a dike they put a light.

Q. And they add ranges from time to time?

A. Unfortunately, no.

Q. When you started piloting on the river there weren't many lights?

A. Yes, quite a number more than there was when I started; but unfortunately they come very slow, and very seldom new ones.

Q. You take the position of these lights by watching them put in, rather than by waiting for the blue-prints to bring them to you, that is, new lights?

A. Yes, and very often the pilots have something to say about their being put in.

Q. About where they go?     A. Suggest it.

Q. Now, when you come in the river by Columbia City there is a place where you can put the courthouse at St. Helens just a little open from the high bank at Lamont Point, isn't there?

A. Well, now, that is some pilot figured that out the same as they did this range. I never use such a thing as that. I have heard they used it, but I don't think I ever used it.

Q. When you are anchoring a vessel, Captain, how far out do you put her?

A. I just judge the distance on the shore line.

Q. Suppose you can't see the shore line?

(Testimony of Captain Edward Sullivan.)

A. In the night-time by light, and in the daytime by shore line.

Q. Just make a guess at it, the distance?

A. Make a guess at it.

Q. How far out do you try to get?

A. So the ship won't hit the bank when it swings around.

Q. Which, the Washington or the Oregon bank?

A. Well, the Washington bank is obstructed by being no bank there [223] practically, shoal water; and the Oregon bank of course is perpendicular bank, and at night has a light on it; so that is the way I judge.

Q. In trying to anchor your vessel so she won't swing and hit the bank, which bank do you mean, either one?

A. Both banks. One bank I can see it, and the other one I have to guess.

Q. How much deep water—what width of deep water do you have at that place?

A. I am ashamed to acknowledge that fact, but I don't know.

Q. Do you realize, Captain, that you have got enough room to anchor a vessel so she will swing clear of both banks by some hundreds of feet?

A. Yes, I think there is quite a lot of room there.

Q. So she can swing clear around on her anchor chain and not come anywhere near either the Washington or the Oregon bank? A. Yes, I think so.

Q. And by bank we are referring not to the line of the river—

(Testimony of Captain Edward Sullivan.)

A. Where she would not touch bottom.

Q. To the deep water line, the thirty-foot line.

A. Yes.

Q. Just measure on the chart with the dividers, and see what width of deep water you have at that place, opposite the lower Columbia City light, where you say you anchor?

A. Well, at the point where this ship is represented as being anchored here abreast of this light, there is fifteen hundred feet between the contours on the Oregon and Washington side—twelve hundred and fifty feet.

Mr. McCAMANT.—That is a correction of your previous figure of fifteen hundred?   A. Yes, sir.  
[224]

Q. Measuring that twelve hundred and fifty feet, Captain, you have measured now from a point on the thirty-foot contour line directly opposite Columbia City front range light, F. W., over to a point on this so-called shoal, where the thirty-foot contour line there is shown, have you not?   A. Yes.

Q. And you have not measured over to where the thirty-foot contour line opposite the Washington bank is shown, have you?   A. No.

Q. Now, if you measured that distance over to where the thirty-foot contour line opposite the Washington bank is shown—please make that measurement and say what that distance would be.

A. Well, it would hardly be fair to take the bend; take it from this point.

(Testimony of Captain Edward Sullivan.)

Q. Take it from opposite the Columbia City front range light, Captain. That is where you say you anchored. That is about sixteen hundred feet.

Q. Now, Captain, do you recall anchoring any vessels off Columbia City at about the time of this collision there October, 1924, or shortly before, or shortly after, that time? A. Did I?

Q. Do you recall anchoring any vessels there?

A. No, I don't.

Q. When did you last use that anchorage ground, do you remember?

A. It seems to me it was a long time prior to that; I don't recall.

Q. They don't use that anchorage ground there so much now as they used to, do they?

A. Well, probably occasion doesn't require it.

Q. There doesn't seem to be so much demand for anchorage at the present time?

A. Well, one reason is, the Columbia City mill is shut down. [225] And that was a shoal place, and a great many ships that went there had to go out in the stream to complete their cargo.

Q. They towed rafts out there and loaded them from the stream, did they? A. Rafts and barges.

Q. They don't do that so much now?

A. No, the mill is shut down.

Q. You don't remember anchoring a vessel there for quite a while prior to October, 1924?

A. No, I don't.

Q. How long prior, would you say?

(Testimony of Captain Edward Sullivan.)

A. I really don't know; have no way of estimating; don't recall any circumstances.

Q. Be several months, or a year, or two years?

A. Might have been a year or six months, or more. I don't remember.

Q. Did you ever hear of a vessel going aground while at anchor, and swing on her chain, on that part that has been referred to as the shoal, in which the twenty-five foot sounding is placed in the center?

A. Never did.

Q. You knew, as a matter of fact, didn't you, Captain, that pilots in using that anchorage ground ordinarily anchor pretty well out from the Oregon side so as not to interfere with the ship channel, don't you?

A. Yes, the general idea would be to try to not interfere with it, I suppose.

Q. What is it? Did you intend to say more?

A. I say, due regard would always have to be made for the safety of a ship, regardless of what the other fellow would do.

Q. But they try to keep out and keep away from the channel, don't they?

A. Generally so, I think.

Q. They try to anchor so as not to impair the ordinary use of [226] these range lights, don't they?

A. Well, the range lights are not impaired by that ship at all.

Mr. McCAMANT.—Referring to the "Boston Maru."

(Testimony of Captain Edward Sullivan.)

Q. I am not asking you about that ship now, Captain. Isn't it a fact that the pilots in anchoring at that anchorage ground try to keep out from the range lights so as not to impair their use?

A. They would have to anchor so far below the range, so they would not impair the use of it.

Q. What do you mean, down the river from there? A. Yes.

Q. Down the river from the Columbia City front light?

A. Yes. A pilot, I don't think, would consider it safe to anchor a ship far enough upstream so that would impair the use of that cross range.

Q. There is plenty of deep water down below there, isn't there?

A. Long ways below, half a mile there where the ship could be anchored; would be another range, though; if a ship was anchored too far down would impair the use of that Columbia City range.

Q. It would have to be half a mile, or a mile, down?

A. No, not necessarily; half a mile perhaps.

Q. Perhaps half a mile. Now, if a vessel is anchored just a short distance below that front Columbia City range light, and fifteen hundred feet out from the Oregon shore, it would be in a safe anchorage, wouldn't it?

A. Yes, it would be according to this chart; it would be a safe anchorage.

Q. And according to your knowledge of the river



(Testimony of Captain Edward Sullivan.)

too, isn't it, Captain? Wouldn't you feel safe in anchoring a big ship there?

A. I wouldn't feel safe anchoring there at night-time.

Q. Where would you anchor at night-time?

A. I would just go out a certain distance from one of these [227] lights, that lower light that showed, and drop the anchor out far enough so she would be perfectly free from swinging to that shore; then I would know she would not hit either shore.

Q. You have better water a little below that Columbia City light, haven't you?

A. Yes; but as I said before, there is nothing on the shore to indicate where that shore line is, so then you have nothing to go by; if both shores were obstructed there would be nothing to go by, so this light would be used, because that is a visible shore, part of the shore line, and the only visible thing there is around there.

Q. If both shores were obstructed it would be easier to use the red lights, or else put Point Lamont on the courthouse, wouldn't it?

A. Well, I never used either one, as I said before.  
Recess until two o'clock. [228]

Wednesday, October 27, 1926, 2 P. M.

Captain EDWARD SULLIVAN resumes the stand.

Cross-examination Continued.

(Questions by Mr. SNOW.)

Judge McCamant asked you a long hypothetical

(Testimony of Captain Edward Sullivan.)

question, Captain Sullivan, which elicited an answer from you to the effect that the two vessels came together in the manner described by you on the paper this morning, and that question you may remember had two branches to it. In the one—as to one branch, you were invited to examine photographs that were handed you, two photographs, and as to the other, you were told a lot of statements appearing in the evidence as to the manner in which the “West Keats” was navigated. I understand that in answering that question you had consideration only for the photographs, didn’t you?

A. Yes; I don’t recall exactly the question as it was put, now.

Q. As I remember your answer, you said, judging by these photographs, you placed it in some such way as that, and gave me the impression you had in mind the photographs only. But I want to make sure of that.

A. I haven’t any wish to criticise the action of the pilot, because he did what he thought was best, and he was there on the ground; I was not: I could only judge by the evidence as given by the photographs.

Q. I didn’t understand it to be a criticism of the pilot, but I just wanted to make sure whether you based your answer solely on the photographs, or partly on the course of navigation of the “West Keats,” as described to you by Mr. McCamant.

A. I can’t recall just now the question as it was put. I wouldn’t like to go into it again unless I had

(Testimony of Captain Edward Sullivan.)

it repeated. I might [229] commit myself to something I had no intention of doing.

Q. You made one statement, Captain, I think was possibly a mistake. As I understood it, however, you said that the "West Keats" could have turned at a distance of a thousand feet, and passed on the Washington side; but I am not at all sure that I understood you correctly, and I don't hardly believe you meant that statement in that way. What did you understand—was that the intention of the answer that I referred to, or did you have some other meaning in mind?

A. The way I understood the question was this: Assuming that the ship, the "West Keats," was headed possibly directly towards the other ship laying across the channel, as I understood he asked the question, at what distance away would I think he should be from the Japanese steamer that he could divert his course to go on the other side of that ship, and I gave the answer about a thousand feet, I thought.

Q. Did you have in mind at that answer the "Boston Maru" lying at right angles to the course of the "West Keats," or some other way?

A. That is the way I understood the evidence gave it, and the diagram on the chart showed the ship lying at right angles to the course of the current and the channel.

Q. So you had in mind the "Boston Maru" lying at right angles to the course of the "West Keats"?

A. Yes, sir.

(Testimony of Captain Edward Sullivan.)

Q. Did you further have in mind the length of the "Boston Maru," four hundred feet?

A. Of course I have in mind how long a ship is, any ship, the average of them. I am familiar with those things.

Q. Did you further have in mind the fact that that "Boston Maru" was anchored, and that the "West Keats" would have had to pass around the bow of the "Boston Maru"? [230]

A. Well, my answer was intended to convey that she could pass either side, if she had a distance of a thousand feet, going at full speed and headed towards the ship.

Q. Headed towards what part of the ship?

A. Well, I wouldn't know what part she was headed to; I assumed she was headed toward the ship, even supposed she was headed at the middle of it.

Q. You were assuming she was headed midships, were you? A. Yes, sir.

Q. Then if she was headed for the stern of the "Boston Maru" you would not say that the "West Keats" could pass around the bow of the "Boston Maru," not changing its course until it arrived at a point a thousand feet from the "Boston Maru," would you?

A. I don't see any reason why she couldn't, even at that; depends on how she was steering, what she had been steering, how the rudder was, and different conditions that might arise, which would be known only to those who were navigating the ship. As-

(Testimony of Captain Edward Sullivan.)

suming that she was steering in a straight line, I don't see any reason why she couldn't be diverted at a thousand feet.

Q. You may assume she was steering well, answering her helm as well as can be expected from that type of ship, and the steering gear in good order; and you should further assume she was fully loaded, full cargo aboard; you may also assume that the water was slack. Now, let's look at this chart, "West Keats" Exhibit 1, again, Captain. Did you have in mind the degree of sharpness of the curve that the "West Keats" would have to make in order to pass the bow of the "Boston Maru" at a thousand feet? A. Well, have some idea of it.

Q. I hand you a tracing here, and ask you to superimpose that upon the blue-print by you, so that the lines of the tracing, if they will do so, correspond with the same lines on the blue-print. [231] I have tried this, and have to inform you that the location of the "Boston Maru" does not exactly correspond with the location on the blue-print, through a mistake at the time the tracing was made. It is now placed so that the other lines of the tracing are supposedly on the same lines of the blue-print. Will you now examine the curve to be made, if the turn is to be made at a thousand feet, and advise me where that leads on the opposite side of the river,—opposite shore.

A. Well, you are only assuming that this ship was doing this. Was she doing that? Was she on this line heading for the stern of the ship when he

(Testimony of Captain Edward Sullivan.)

discovered that there was not room enough in there for him, and was he doing this? That is only an assumed position.

Q. I am asking you to make the assumption, Captain, that the "West Keats" at the time—I am asking you to make this assumption: That suddenly or otherwise the pilot of the "West Keats" might decide that it would be impossible to run between the Oregon shore and the "Boston Maru"—decided to turn over to the Washington shore, and he makes that decision when the vessel is a thousand feet from the "Boston Maru." I am asking you to make that assumption, and I am asking you further to assume he is heading at right angle to the position of the "Boston Maru," and approximately to the stern of the "Boston Maru."

A. You are asking me to assume a whole lot. Is that the truth? If it were true, and can be proven to be true—but I am not assuming to dictate what course this man would pursue; whether he was steering straight with the intention of going around the stern of the ship, and whether he would suddenly have to change his mind and go the other way, or whether knowing the ship was there, he was expecting to go on that side.

Q. You understand, Captain, that this Court is now trying to [232] get at the truth of this matter, and in doing so it hears conflicting testimony, the testimony offered by both sides, and I can say to you there is no testimony and will be no testimony that the pilot of the "West Keats" ever

(Testimony of Captain Edward Sullivan.)

tried to pass on the Washington side of the "Boston Maru." The testimony is all the other way, that he attempted to pass on the Oregon side, thinking he could do it. There is testimony he thought so until right up to very close to the time of the collision. But I am asking you now—you have stated that he could have turned out a thousand feet to pass on the Washington side?

A. Well, but there was no assumption on my part as to what position he was in when he would have to make that.

Q. Would you make that same statement if you made also the assumption that he was in the position shown on this tracing?

A. Well, I am making the assumption that a pilot would come down the channel and make a turn down this place the same as I have done myself a great many times, and the same as any other pilot does it.

Q. What do you mean, make a turn at this place?

A. From St. Helens range down a course along the shore. I don't think under the circumstances I am obligated on my part to make any such drawing as this—to make any such assumption.

Q. Captain, you made the statement that the "West Keats" at a thousand feet could have turned and passed the Washington side?

A. I assume that he came down the channel in the regular way, and turned this course in the regular way, and that this ship was lying and proved to be in a position up close, too close to the Oregon shore, to permit his passing; he wouldn't be head-

(Testimony of Captain Edward Sullivan.)

ing for the stern of the ship if she was that close when he made this turn. He would have turned out on this range [233] in the regular way, and probably be heading more for the center of the ship, I would think. Of course we have to assume that the pilot on the ship is a pilot and knows what he is doing, and he wouldn't put himself in a position of that kind without finding any way of getting out of it.

Q. If a ship were broadside to your ship, Captain, and you were piloting the vessel, the "West Keats," do you mean to say that you would run right for the center of that vessel ahead of you at a distance of a thousand feet?

A. If she was in the position as described in this chart, as shown here, as was supposed to be, that is about the position that the ship would be headed that is coming down the channel and turning in the usual way; would be heading about for the middle of the ship.

(Question read.)

A. I said that I would need at least a thousand feet if I were headed in that position, sufficient to make the turn the other side of the ship.

Q. If you were headed toward the center of the ship ahead of you, you would want a thousand feet to turn around, at least a thousand feet?

A. Yes, to make a safe turn.

Q. But you would not be headed for the center of the ship, would you, Captain, if you knew was the center of the ship, could see her lights?



(Testimony of Captain Edward Sullivan.)

A. Would be headed down the channel. It would be up to the pilot—if he knew the ship was there, and he knew it was a ship there, and he knew she was lying across the stream, before he got in that position, why it would be up to him to determine what to do. I would not determine for him what to do from my point of view. I don't know anything about what he done, or [234] what he found when he got there, but I assume he is a pilot, acting as a pilot does.

Q. Well, I can tell you, Captain, that the assumption that you make, that he was heading squarely for the center of that vessel is not supported by the evidence in this case; but the evidence in the case, on the other hand, without contradiction, as far as I can recall—I am sure without contradiction, supports the assumption that he was headed about for the stern, a little outside the stern of the "Boston Maru."

Mr. McCAMANT.—I dispute that conclusion.

COURT.—When was he so headed?

Mr. SNOW.—At a distance of a thousand feet. The only evidence on that point is by Captain Berry himself.

A. Well, I didn't have that evidence in mind when I answered the question. I knew nothing about the evidence; I didn't listen to it, and never read it, and I know nothing about it. I was merely asked a question as a pilot, and I assumed that the pilot who was handling the ship would know all about the situation as he came to it.

(Testimony of Captain Edward Sullivan.)

Q. As a matter of fact, if the "West Keats" were headed at or a little off the stern of the "Boston Maru," and the "Boston Maru" was approximately at right angles to the course of the "West Keats," and the distance between the two vessels was a thousand feet, and the night was dark, the pilot of the "West Keats" would need a little more than a thousand feet to make that turn, wouldn't he?

A. Well, I don't know; it would depend on how he was steering when he reached that decision; whether he was swinging one way or the other; just how the ship was steering, or how he was steering it; what he had in mind. [235]

Q. Suppose he was going perfectly straight, and this ship was not swinging one way or the other when he reached that decision. Wouldn't he need more than a thousand feet to clear her bow safely and not run ashore on the Washington side?

A. Well, I would think he would be rather foolish to get in such a position as that.

Q. I think you are right, Captain. He would not let himself get in that position where he would have to make a turn of that kind, would he?

A. I wouldn't think so.

Q. And he would not attempt a turn of that kind, would he, except under very extreme circumstances. Isn't that correct? A. I would not think so.

Q. That is too short a turn, isn't it?

A. Why, such a thing could be done to avoid the ship.

(Testimony of Captain Edward Sullivan.)

Q. Suppose you were going to undertake a turn of that kind, Captain, what orders would you give to bring it about?

A. Well, I wouldn't answer such a question. I wouldn't put myself in such a position unless I was there handling the ship.

Q. I think that is a fair question, Captain, to ask what order would you give to bring about a turn of that kind.

A. No, it is not a fair question, because you would have to assume the pilot would use some intelligence about getting into such a position as that; I can understand it might be so in handling an automobile, but a ship—

Q. Captain, you would not have a reputation as a conservative and skillful pilot for a period of forty years here, if you allowed yourself to get in a position like that. But suppose you were put in a position of that kind, without any fault of yours, that is, you were headed towards the stern of a ship [236] lying crosswise to your course, and a thousand feet distance, and you had to turn around her bow, what order would you give to do that?

A. I wouldn't undertake to answer your question.

Q. Can it be done?

A. Well, I would think it could be done; yes.

Q. How could it be done?

A. Well, of course if the ship—it was necessary—you were in a jack pot like that, and it would be necessary to swing the ship, you would put her hard

(Testimony of Captain Edward Sullivan.)

aport and take the consequences, what happened to her, after you got by.

Q. If you put her engines full speed astern you would get a little help from that, wouldn't you?

A. Somewhat, I judge, in going at full speed; but I think in such a dangerous position as that I would not be running full speed.

Q. That would be a very sharp, dangerous maneuver, would it not, Captain?

A. Not necessarily dangerous, but as far as the Japanese steamer was concerned, that would be the very thing you would look after; what happened after that; wouldn't be as expensive as it would be hitting that ship.

Q. Now, the blue-print or tracing which has been superimposed on the blue-print by you, shows approximately, does it not, the character of the curve you would have to make in order to turn at a thousand feet, to pass a ship under those conditions?

A. Well, now I don't know, I haven't measured such a thing. I think you are putting me in a position that I don't—I haven't really put myself in such a trap as that by any question I answered, and it would depend so much on how the ship had been [237] steering, and how he came to get in such a position as that.

Q. Well, Captain, you made the statement that the "West Keats" could have turned out a thousand feet, and I am only testing it out to find out exactly what you meant by that.

A. Well, in this question there was nothing said

(Testimony of Captain Edward Sullivan.)

about her position before the turn was to be made, was there?

A. Yes, she was headed straight for or immediately off the stern of the "Boston Maru," and going straight ahead with her helm steady.

A. I don't recall.

Mr. McCAMANT.—That is your question, not mine.

Q. Yes, that is my question, not Judge McCamant's, that is true. You would not undertake to show that the curve shown in the tracing, commencing at a point a thousand feet from the outline of the "Boston Maru," would be approximately the curve that would have to be followed by a ship?

A. No, I don't know as to that.

Q. You would not express your opinion as to that? A. No.

Mr. SNOW.—I would like to have the tracing marked for identification.

(Marked "West Keats" Identification No. 2.)

Q. When you place a ship at anchor, Captain, off Columbia City, you have in general two locations to make; you have to locate yourself up and down the river, don't you, Captain—tell how far you are up and down the river, and how far you are from shore to shore, what position shore to shore?

A. Yes, sir.

Q. And you make use of that lower Columbia City range light, front light, in order to determine your position up and down stream, don't you?

A. Yes, sir.

(Testimony of Captain Edward Sullivan.)

Q. And you don't use any light or any other landmark to determine [238] your position across the river? A. No.

Q. And I believe you said that you didn't anchor a vessel in that position for as much as a year before October, 1924?

A. I said that I don't recall.

Q. And that you never used the red range?

A. Never did.

Q. If it should appear now that the red range was in existence for a period of more than a year, for a period of a year and a half prior to October, 1924, would that refresh your recollection as to whether you ever anchored at that point, or ever made any possible use of it?

A. I am quite sure I did not, regardless of what period of time it was there.

Mr. SNOW.—That is all.

Mr. McCAMANT.—We offer in evidence the diagram made by the witness with reference to the manner in which the ships may have come together.

(Marked "Boston Maru's" Exhibit "M.")

#### Redirect Examination.

(Questions by Mr. McCAMANT.)

Captain, in anchoring vessels in the Willamette and Columbia Rivers between Portland and Astoria, what is necessary with reference to the fairway?

A. Why, where the ship would safely lay up to anchor, swing without going aground.

Q. Is it possible to find that kind of a place except by anchoring in the fairway, ordinarily?

(Testimony of Captain Edward Sullivan.)

A. I don't know of any such place; might be possible at Longview, a ship could get out of the fairway, or at Quinns.

Q. Except in those two places do you know of any place between Portland and Astoria where a vessel can anchor except to anchor [239] in the fairway? A. I do not.

Mr. SNOW.—What do you regard as fairway?

A. Any place between the thirty-foot contours of a channel.

Witness excused. [240]

TESTIMONY OF CAPTAIN MICHAEL MORAN, FOR THE "BOSTON MARU."

Captain MICHAEL MORAN, a witness called in behalf of the "Boston Maru," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT.)

Captain, you are a Columbia River pilot?

A. Yes, sir.

Q. And have been for how long?

A. Fifteen years.

Q. And you hold state and Government license?

A. Yes, sir.

Q. And have for that period of time?

A. Yes, sir.

Q. And during that fifteen years has it been your occupation to pilot vessels up and down the Willamette and Columbia Rivers? A. Yes, sir.

(Testimony of Captain Michael Moran.)

Q. And are you familiar with the channel?

A. Well, fairly; yes.

Q. I will ask you whether or not you piloted a vessel either up or down the Columbia River on the night of October 25, 1924?

A. I believe I went down the river that night.

Q. With what vessel?     A. "Georgina Rolph."

Q. "Georgina Rolph"?     A. Yes.

Q. And did you pass the "Boston Maru" while she lay at anchor off Columbia City?     A. Yes.

Q. On which side of her did you pass?

A. I went on the Washington side.

Q. About what hour was that, Captain?

A. I should say I left here about nine o'clock, and it takes about three hours to get down there with that ship; that would be about midnight.

Q. About midnight?

A. Probably about midnight.

Q. Did you have any difficulty getting by on the Washington side? [241]     A. No, sir.

Q. How far above the anchorage place of the "Boston Maru" did you observe the "Boston Maru"?

A. Well, after I made the turn, when I was making the turn, rather, coming down on the Columbia City ranges, on the St. Helens range, rather, red and white range.

Q. At the time you came off the St. Helens range was that when you observed the "Boston Maru"?

A. Yes.

Q. Were her anchor lights burning?



(Testimony of Captain Michael Moran.)

A. Yes, sir.

Q. The "Georgina Roth" is how large a ship?

A. I think she is about twenty-five hundred ton ship. That is her deadweight tonnage, I guess; would be around three thousand tons.

Q. Was she loaded at this time?     A. Yes.

Q. What was her draft?

A. About twenty-three feet.

Q. What speed was she going?

A. Made about nine, I think, nine knots; from nine to ten.

Q. About how far off the "Boston Maru" did you pass her?

A. Oh, probably three or four hundred feet.

Q. Three or four hundred feet toward the Washington shore?

A. As near as I can remember; just a good clearance.

Q. What do you understand to be the channel in the Columbia River?

A. The channel in some places is from three to five hundred feet wide.

Q. When you speak of the channel, what do you understand by the word "channel"?

A. I understand it is just the ship's channel, that is what I go by; in some places from three to five hundred feet wide; up here where we are talking about considerably wider. [242]

Q. Considerably wider at the point of this collision?

(Testimony of Captain Michael Moran.)

A. Yes, twelve or thirteen hundred feet, fifteen hundred feet, there.

Q. You consider that the channel is at least the extent of the thirty-foot contour?

A. Well, now, it is; yes.

Q. Captain Moran, will you explain to the Court what the effect of a flood tide is on a vessel lying at anchor in the Columbia River?

A. That depends a good deal on the tidewater that is running down, fresh water; depends—this is the time of the year we have considerable flood, and the size of the tide depends a good deal on whether new moon tide, or flood and ebb tide.

Q. If you anchor a vessel when the tide is going out and put out thirty fathom of chain off Columbia City, what is the effect on that vessel when the flood tide comes in, at this time of the year, October?

A. She will naturally swing to her anchor when it gets strong enough to do so.

Q. How would she swing? Will she ride her anchor, or will she swing with the anchor as a pivot?

A. If no wind probably will float up right over the anchor.

Q. Assuming that the wind is negligible, you think will float up right over her anchor?

A. Yes, if calm, no wind.

Q. After she has come up over her anchor will she swing?

A. Well, as soon as a strain comes on the chain she will, yes.

(Testimony of Captain Michael Moran.)

Q. And she will swing on what radius of an arc?

A. Just about the length of herself, I guess.

Q. Just about the length of herself?

A. If there is no wind, and the chain is not stretched out. [243]

Q. I call your attention to a photograph of the "West Keats," in evidence as "Boston Maru's" Exhibit "H," and a photograph of the "Boston Maru," in evidence as "Boston Maru's" Exhibit "D," appearing to show the place at which these two vessels collided, and I call your attention to the fact that the evidence shows that the "West Keats" collided at her hawse-pipe some few feet back of the bow, on the starboard side of the "West Keats." You knew from your own observation the place where the "Boston Maru" was anchored in the Columbia River on that night, and I will ask you what the point of contact of these two vessels indicates with reference to whether or not the "Boston Maru" was lying directly athwart the channel, and whether or not the "West Keats" was proceeding parallel with the Oregon shore?

A. That I couldn't tell; I wouldn't say how she was, because I didn't see her when she was lying up and down stream. The "Boston Maru" was right in the ebb tide when I passed her bow. Further than that—if she was lying across the channel, of course I didn't see it.

Q. And you would not attempt to testify from the photograph?

(Testimony of Captain Michael Moran.)

A. No, sir, I don't think so. All it shows here is the damage.

Q. What is that?

A. Just shows the damage done to her starboard hawse-pipe here, and forward.

Q. One thing more about the swinging of a vessel, Captain Moran; in the absence of a wind can you tell in advance which way a vessel is going to swing when you anchor her in the Columbia River?

A. Well, some places you can, and some places you can't. I couldn't there, I don't think.

Q. Couldn't tell at Columbiar City? [244]

A. Not exactly, I don't think. Just as likely to swing her towards the Washington shore with her stern, as towards the Oregon shore. Some places you have an idea, and she may not act just exactly the way you think she will there.

#### Cross-examination.

(Questions by Mr. SNOW.)

The "Georgina Roth" is two hundred and forty-five feet long, isn't she?

A. I don't exactly know; she is somewhere round there.

Q. And two thousand tons gross?

A. I guess she is probably very near.

Q. How much water did you say she drew?

A. About twenty-three feet loaded; twenty-three to twenty-four.

Q. What was the state of the tide when you passed the "Boston Maru"?

(Testimony of Captain Michael Moran.)

A. It was the last of the ebb tide, as near as I can remember.

Q. You are sure it was not almost flood tide?

A. No, she was lying—all I had to judge by, was ebbing on the “Boston Maru” at the time I passed her by; the tide was still running down.

Q. Was a current there still, was there?

A. Yes, was a little bit.

Q. That current would continue for some time after the tide started to flood, wouldn't it?

A. After low water on the tide ebb, would probably run down an hour or so afterwards; depends a good deal on the amount of fresh water coming down.

Q. Wouldn't be a reverse current at the place in question, except the last couple of hours flood tide. Is that right?

A. I think that is about right; that is about the way it runs. [245]

Q. Sometimes not any there at all?

A. In the summer time no flood tide.

Q. You had plenty of water to pass on the Washington side, did you? A. Yes, sir.

Q. Where did you leave the St. Helens bar, do you remember?

A. I left about after we turned off the St. Helens range.

Q. I asked you when you left St. Helens bar range, and you meant to say that you left it after you left behind you the end of the jetty?

A. No, not quite. I go over there quite a ways,

(Testimony of Captain Michael Moran.)

probably eight hundred or a thousand feet further from the end of the jetty.

Q. You think you left the St. Helens bar range approximately a thousand feet below the end of the jetty?

A. Yes, about that, probably. Maybe more. I can't say.

Q. Did you use the so-called red range; did you pick that up astern as you went down? A. No.

Q. You went without the aid of ranges, then, until you got clear below some place—

A. I just used the St. Helens range; got no particular place of turning after I get a little ways over from the end of the jetty; I turn anywhere I think I have room there.

Q. But you leave St. Helens range?

A. Yes, after get abreast Columbia City mill; that is generally what I use; that is the Western Spar mill, I guess that is what they call that lumber company.

Q. The Western Spar dock, where the lights are?

A. Yes, sir; when get abreast of that I haul down to go down the river; I change my course there off the St. Helens range, to go down the river there.

Q. That is more than a thousand feet below the end of the St. [246] Helens jetty, isn't it?

A. The dock is, yes, quite a little ways over; probably two thousand feet over; about half-way between the end of the jetty and that mill.

Q. The "Boston Maru," when you passed her

(Testimony of Captain Michael Moran.)

was lying straight up and down the stream, was she? A. Yes, sir.

Q. When did you testify that you made out the lights of the "Boston Maru"?

A. Well, after I started to turn coming down the river; after I started to turn off St. Helens range I saw her lights down there.

Q. What kind of lights did she have, bright lights, or not very light?

A. They were bright lights, same as average anchor lights.

Q. Same as average anchor lights?

A. Yes, bright enough for me to see.

Q. So you made up your mind then to go down nearer the Washington side than the Oregon side, before you saw the "Boston Maru," did you?

A. No, I didn't. I don't know as I did; but it seemed to me I had more room on the Washington side. That is what brought me out there.

Q. If you had had a deep draft vessel would you have kept in a little closer to the Oregon side, setting aside the "Boston Maru"?

A. No, I don't think I would; I would have went down about the same.

Q. With a vessel anchored at the anchorage ground, off of Columbia City range light, would you ordinarily pass on the Oregon side of such a vessel, or on the Washington side?

A. That depends on where she was anchored, the position she [247] would be in, what side I would pass on. If I thought closer to the Oregon shore,

(Testimony of Captain Michael Moran.)

and I had more room on the Washington shore, would naturally pass on the Washington shore. If she was anchored out there about as customary to anchor, I would pass on the Oregon shore, in a case of that kind.

Q. The customary place is over to the Oregon shore?

A. Mostly we generally anchor out there.

Q. You have anchored vessels there yourself, have you?   A. Yes, to load, finish loading.

Q. Do you use the red range to anchor, or did you at that time?

A. I never used the red range; what I generally used to use was the courthouse at St. Helens, and Lamont Point. I kept that open a couple of hundred feet. That would leave me five or six hundred feet out, or probably more, than where the "Boston Maru" was anchored. I couldn't rightly say what distance it would be, but it would be five or six hundred feet further out.

Q. Five or six hundred feet further out towards the Washington shore than where the "Boston Maru" was on that night?   A. Yes, sir.

Q. And you would find that place by using Lamont Point and the courthouse?

A. And the courthouse, yes, and abreast of the front range light coming down off the Columbia City range, as we call it.

Q. Do you sometimes anchor a little below that?

A. No, not if I could help myself. Depends on what I am going to anchor for. If I was going to



(Testimony of Captain Michael Moran.)

anchor for a short time I wouldn't be very particular about where I was anchored.

Q. And you saw the lights of the "Boston Maru" on this occasion? A. Yes, sir.

Q. Just after you turned off the St. Helens range? [248]

A. Yes, and I think I seen them before; I believe I seen them before I turned.

Q. I mean to make them out as a vessel at anchor. You may have seen them before but didn't know what they were.

A. Not much difficulty in making out anchor lights as long as they are bright; the forward light stands up way up higher than the after light, several feet.

Q. The customary ship channel at that point is on the Oregon side of the anchorage ground, is it not?

A. Well, if you are going to anchor ship there to take cargo, it is, yes. If you are only going to anchor there for a few hours, a man generally doesn't figure on anything coming along there sometimes, and he will drop his anchor anywhere, because a man can get either side if he is in the middle.

Q. I don't think you understood my question.

A. I understand it thoroughly.

Q. I say, the customary ship channel at that point is on the Oregon side of the customary anchorage ground, isn't it?

A. Well, it is, yes, rather on the Oregon side.

Q. When a vessel swings on her anchor, with a

(Testimony of Captain Michael Moran.)

rising tide in the Columbia River, it is difficult, if not impossible, isn't it, to say in advance, or know in advance, which way she is going to swing?

A. I think it is; she is just as liable to swing one way as the other, if there is no influence of wind or anything on her.

Q. And it is difficult, if not impossible, to tell whether she is going to pull on her anchor chain, isn't it?

A. Well, don't know much about that, you know; as long as no wind or anything, she doesn't pull very much on the anchor chain, just enough to swing her; doesn't take very much to [249] swing a vessel one way or another.

Q. Possible for the current to carry her out, so will pull on the anchor chain one way or another, isn't it?

A. Yes, she will be going according to the current.

Witness excused. [250]

#### TESTIMONY OF CAPTAIN JULIUS ALLYN, FOR THE "BOSTON MARU."

Captain JULIUS ALLYN, a witness called on behalf of the "Boston Maru," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT.)

Captain Allyn, what is your occupation?

A. River pilot.

(Testimony of Captain Julius Allyn.)

Mr. SNOW.—Admit the captain's qualifications, and admit one of the Columbia River Pilots Association. You belong to the Association, Captain?

A. Yes, that is the Columbia River Pilots.

Q. How many years have you been piloting on the Willamette and Columbia Rivers, Captain?

A. About twenty years.

Q. I will call your attention to "West Keats" Exhibit No. 1, being a blue-print of a chart of the Columbia River, and I direct your attention particularly to a point near the lower end of the chart, where is designated the place at which the "Boston Maru" was anchored on the night of the collision, with which we are concerned in this case, and I will ask you how that vessel lies with reference to the usual anchorage ground, usual place where vessels anchor in that part of the river.

A. Well, from the position I should judge she was over near the place where I would anchor a vessel on a dark night. It is as near as I can determine by looking at this chart.

Q. Is it possible in anchoring a vessel on a dark night to fix with accuracy the place where you are anchoring? A. It is not, no; it can's be done.

Q. Is it desirable to have a light on the bank near the place where you anchor?

A. Oh, yes, to determine somewheres about your position. The method I have always been using here would be to put, say, [251] this lower Columbia City range, put it right abreast of the bridge of the vessel, and then get the bearings of

(Testimony of Captain Julius Allyn.)

the bow and stern. That way you determine within a few feet—that is, I would say a couple of hundred feet where your position was off the rear light.

Q. And if you attempt—suppose you attempt to anchor three or four hundred feet down the river, what difficulty if any, would you have?

A. Well, you would have no accurate bearing as to just your position. That is why we always try to select a light when we anchor, if it is possible.

Q. Now, I wish you would tell the Court, Captain, what the effect of the flood tide is on a vessel at anchor at that place in the Columbia River. Suppose your vessel anchors at ebb tide at that point, can the pilot tell on which side of the river—which way the vessel will swing when the flood tide comes in? A. No, he cannot.

Q. How will the flood tide affect his vessel with reference to the anchor chain, suppose there are three hundred fathoms of anchor chain out?

A. Well, from observation I have noticed vessels at anchor, that when flood tide comes, the water comes up and slacks up the chain until it swings around, then it tightens the chain again, just the same as they lay on the ebb tide. I have watched them down near Astoria there where we have a good chance to observe the flood and ebb tide.

Q. And the vessel will come up stream straight before it begins to swing, if I understand you correctly?

A. It seems to come up a ways, that is come up

(Testimony of Captain Julius Allyn.)

I suppose until the chain gets tight, then it will swing on the chain, whichever way the tide swings the vessel. [252]

Q. When it does swing, the radius of the arc on which it swings is what?

A. That would be a hard thing to say, because you never know what the wind or tide conditions are.

Q. Let's assume that there is no appreciable wind, that the wind is negligible and you—when the vessel begins to swing, the flood tide is just beginning to come in, isn't it? A. Yes, sir.

Q. The water would be low, would it?

A. Just beginning to change.

Q. And the vessel does her swinging, doesn't she, when the tide is comparatively a light tide?

A. Yes—well, of course the tide—the beginning of it, of course the flood tide is very weak; same way if swings the other way; swings very slightly at first until the tide gains strength, then of course tightens up on the chain.

Q. Now, would the radius of the arc on which the vessel swings be much in excess of the length of the vessel?

A. That I couldn't say; I don't know.

Q. How much chain is it customary to put out in anchoring a vessel four hundred feet long, at that point in the Columbia River?

A. Thirty fathoms in the water.

Q. Are there any obstacles to interfere with the view of the vessel lying at anchor at the point in-

(Testimony of Captain Julius Allyn.)

indicated as the point of the "Boston Maru," from Warrior Rock on?

A. To explain it, from Warrior Rock down, the pilot's attention would be turned on his course, and he probably would not have any opportunity to observe anything; of course he would have an unobstructed view, but he would be too busy looking at his course; then he turns down along St. Helens jetty, what is called St. Helens range, and he would have to pass the [253] St. Helens light, before he would have what we call an unobstructed view of the lower river; then he could probably get a view, but otherwise this light there might confuse him, but when he passes that light then he could have an unobstructed view.

Q. What light do you refer to?

A. This light at the end of the jetty; this St. Helens lower light, red light.

Q. No. 28-2?

A. I don't know the number of it.

Q. Marked on this chart 28-2?

A. Yes, that would be correct.

Q. Is there any building or any hill, or anything of that kind between Warrior Rock and the point indicated as the anchorage of the "Boston Maru"?

A. No.

Q. You think the attention of the pilot would be directed to other things while making the journey?

A. Yes, until he makes the turn; he has to come down and make an abrupt turn to the upper end of the jetty, and down this St. Helens range, they

(Testimony of Captain Julius Allyn.)

call it, and have to pass this light here before he would have his mind free to observe anything on the down river points.

Q. Are you familiar with the Willamette and Columbia Rivers between Portland and Astoria?

A. Well, I have traveled up and down a good many times, yes.

Q. State, Captain, whether it is possible, except in a very few places, to anchor a vessel at any point in these rivers between Portland and Astoria, other than in the fairway.

A. Not if he anchors in fog; if he anchors in fog he has got to anchor in the fairway, no matter where he anchors.

Q. Suppose there is no fog but it is night.

A. There is only, you might say, one or two places on the river where a person could; of course try to get as far away [254] out of the main channel—I don't mean the main channel but fairway, as possible, but it would be somewhere like Rainier and Quinns, or somewhere we could do it. Some call it Oak Point, some call it Quinns; that is below; there you can get out quite a little distance out of the main passageway of ordinary steamers, but it is about the only place there is.

Q. In other places you find it necessary to anchor where the steamers go?

A. Yes. Of course I say you try to get as far out as possible but these are about the only two places. There is a place down just above Astoria,

(Testimony of Captain Julius Allyn.)

where you can anchor out of the main ship channel, but it is the only place.

Q. I call your attention to "Boston Maru" Exhibit "H," being photograph of the "West Keats," and in that connection, I inform you that the testimony shows that the "West Keats" collided with the "Boston Maru" at the hawse-pipe on the starboard side of the "West Keats," a few feet back of her bow. I also call your attention to "Boston Maru" Exhibit "D," being a photograph of the "Boston Maru," purporting to show the condition of the "Boston Maru" after the collision, and I will ask you to state what these photographs indicate to you, as to the manner in which the "Boston Maru" was lying, athwart the channel or otherwise, and the course of the "Boston Maru" immediately prior to the collision.

A. I couldn't say just what position the "Boston Maru" was lying, but of course from this photograph you would have to take that the anchor caught the stern on the starboard side of this "Boston Maru," but in that you can't determine just how the vessels were lying at anchor in the stream.

Q. Captain, suppose the "Boston Maru" were lying nearly athwart the channel at the point indicated on this chart, and the [255] "West Keats" collides with her at the hawse-pipe of the "West Keats," a few feet back of her starboard bow, and hits the "Boston Maru" at the point indicated by the photograph, "Boston Maru" Exhibit "D," what would that indicate as to the course that the



(Testimony of Captain Julius Allyn.)

“West Keats” was pursuing at the time of the collision?

Mr. SNOW.—May I offer an objection, and ask that the models be picked up and handed to the witness, so that he can put them down on the chart in his own way; this suggests to him, I think, a little too much in the way of laying them down.

A. Well, of course from—I ain't putting these down in accordance with the marks on the chart—but naturally if you take where the “West Keats” struck, would have to strike in about this position; here is the starboard anchor, and there is the starboard side of the “West Keats”; would have to strike about like that; if she struck this way would take the stern of the other vessel; that is about the best I can do; that is the way I determine.

Q. May I ask the witness to kindly place these ships in the position indicated, with this paper underneath; now, will you be good enough to place them.

A. They would be about that way; that is the best position I could give in my judgment.

Q. That is about right now, is it, Captain?

A. Yes, that is about the best that I can do.

Mr. McCAMANT.—I offer in evidence the diagram identified by the witness.

(Marked “Boston Maru” Exhibit “N.”)

Q. State what the facts to which your attention has been called indicate with reference to how close

(Testimony of Captain Julius Allyn.)

the "West Keats"—stern of the "West Keats" was to the Oregon shore at the time of the collision.

A. I couldn't answer that. [256]

Q. Wouldn't make any—

A. No. I couldn't make any answer to that because I wouldn't know. I didn't see the vessel at anchor so I don't know.

Cross-examination.

(Questions by Mr. SNOW.)

Captain, in anchoring a vessel off Columbia City, and having reference to the time of this accident, which was October, 1924, you testified that you put the front range light, front Columbia City range light about midships of your bridge?

A. Yes, sir.

Q. And then you put the bow—you got one bearing for the bow, and another bearing for the stern, didn't you? A. Usually, yes, the best I can.

Q. You didn't say what those bearings were but I understood you to mean you put the bow on Lamont and the stern on Caples Point; is that true?

A. Yes, that is what I use, the best I could.

Q. Referring to "West Keats" Exhibit 1, before you, I will show you a line marked "Lamont F. W.," one line marked Caples Point Lamont Line, and I inform you that there is testimony in this case to the effect that that line is drawn straight from Caples Point, over here on the chart, to Lamont Point, which is not on this chart, but the line is put in the correct direction nevertheless. I will ask you if

(Testimony of Captain Julius Allyn.)

that is the ordinary place where you anchor.

A. Yes, they usually try to get that vessel in that position if possible; of course you may vary quite a number of feet, and on a dark night you don't know just—can't determine where you are really.

Q. Of course you can't tell within fifty or a hundred feet—twenty-five or fifty feet?

A. Yes, more than that.

Q. But you try to keep out of the main channel?  
[257] A. Yes, if possible.

Q. And the main channel is down the Oregon side?

A. Always follow down the Oregon channel when coming up this way.

Q. I understood you to say at the opening of your testimony that the place of anchorage of the "Boston Maru" as shown on that exhibit is near where you ordinarily anchor vessels at that point, and I take it that is a mistake; either you didn't intend to say that or I misunderstood you.

A. What I did say was I usually get this light abreast of the bridge of the vessel, get these two bearings that way, and anchor so as to get a light some way so you could determine where you were. That is the question I intended to answer; I don't know how I answered it.

Q. You would not anchor out just in the middle of the stream without knowing how far to one side or the other you were, if you could avoid it?

A. No, if there is any light so I could see; any-

(Testimony of Captain Julius Allyn.)

way to see, no; you have to have something to go by.

Q. And you would always take advantage of a light or something you could see, if you could?

A. Yes, always, foggy weather or any other time, always try to get near a light to anchor if possible.

Q. That is the reason you want a light not only abreast the bridge to tell you how far up and down stream you are, but also a light fore and aft, to tell you how far out in the stream you are.

A. Light on Lamont Point but not the other point.

Q. Not on Caples Point?     A. No.

Q. You get the loom of that point?

A. Yes, just as best you can; kind of a dark object.

Q. You stated that a vessel coming down the river could tell about [258] the time it passed this light at the end of the jetty designated as 28-2—could make out lights of an anchored vessel.

A. Yes.

Q. At the customary anchorage?

A. That is he would have nothing to obstruct his view after he passed that light.

Q. And you would expect in coming down the river to be able to make out any vessel anchored there?     A. Yes, sir.

Q. If there was such a vessel anchored there?

A. Yes, indeed.

Q. And you would assume, of course, she was in the customary anchorage?     A. Always.

(Testimony of Captain Julius Allyn.)

Q. What can you say of the custom of anchoring vessels at that place? Other pilots anchor their vessels there, too?

A. Been anchoring there ever since I been in the pilot business.

Q. They customarily anchor pretty well out from the Oregon shore over towards the Washington shore? A. If possible, yes.

Q. So as to leave water for the channel?

A. Yes, the main object is to keep out of the main fairway as much as possible.

Q. And the Oregon shore has been the main ship channel for a long time, has it?

A. Yes, always pass up and down the Oregon shore if possible, yes.

Q. Have these two ranges, the St. Helens and the Columbia City ranges, been established for a long period of time?

A. They have been there ever since I have been in the pilot business.

Q. So always been the custom to navigate the Oregon shore, and to anchor over towards the Washington shore? A. Yes, sir.

Q. There isn't as much room for anchorage there, I take it, as there is at these other places you mentioned, Oak Point and another point whose name I didn't catch. [259]

A. Rainier, you might call it.

Q. There is more room at Rainier, is there?

A. Yes, more room at Rainier, and Quinns or Oak Point, than there is here.

(Testimony of Captain Julius Allyn.)

Q. When you pass that light at the end of the jetty, marked 28-2 and you get an unobstructed view of the vessel at anchor, can you tell from the anchorage lights on a very dark night, just how far away she is from the Oregon shore, and how far from the Washington shore?

A. No, any dark night you can't tell exactly how far you are away.

Q. There is a high bank on the Oregon side, isn't there?

A. Yes, yes, that is higher than it is on the Washington side.

Q. Not much of a bank at all on the Washington side? A. No, very low bank.

Q. Very low, sort of marshy country leading back from the river? A. Yes, very low land.

Q. Now, on the Oregon side, does this high bank make the river a little darker on that side, or harder to see?

A. Bound to; everywhere there is a hill it creates shadows, no matter whether it is water there, or any other place.

Q. Creates what you call a shadow and makes it a little blacker there, does it?

A. Yes, naturally would; I don't mean every night but on a good many nights.

Q. If a vessel is anchored and swings with the tide into a position, approximately the position marked on this chart, "West Keats" Exhibit 1, "position at collision," how far above—what is the longest distance above that, that a vessel coming

(Testimony of Captain Julius Allyn.)

down the customary ranges and customary channel could tell, on a very dark night with that shadow over the water, whether there was room enough to pass on the Oregon side or not, of that vessel?  
[260]

A. Well, after he passed this light here he ought to be able to determine—the pilot to determine which side to go on.

Mr. McCAMANT.—Is that the light designated 28-2?

A. It is up here; after pass there ought to be able to designate or make up his mind where he was going.

Q. What guidance would he have to enable him to make up his mind there, Captain?

A. Use his own judgment.

Q. What would he use it on? Would he line this up by anything?

A. See the vessel at anchor; see the vessel at anchor down below and use his judgment which side to take.

Q. But you said a little while ago he couldn't tell where she was anchored there, didn't you?

A. I told you—I didn't say he couldn't tell where she was anchored, but I said when he gets around here could see whether any vessel anchored down there.

Q. Yes, you said that; when he passed 28-2 could tell whether vessel there and could make out the lights of the vessel anchored there?

(Testimony of Captain Julius Allyn.)

A. Yes, could determine the lights on the vessel, yes.

Q. And also added, didn't you, couldn't tell the exact location of that vessel?

A. Well, he probably would be able to form an idea, that is, he couldn't give an accurate estimate of it, but he could form his judgment of it. Of course now I don't say this at all; I never saw the vessel, and I am just only giving expert testimony, that is all I am giving.

Q. You think that at that point he could form a judgment, but he couldn't expect to form an accurate judgment as to where she is?

A. That is up to him. [261]

#### Redirect Examination.

(Questions by Mr. McCAMANT.)

Captain, if the pilot of a vessel coming downstream observes the lights of an anchored vessel, and that the lower of the two lights is toward the Oregon shore, what would that indicate to him?

A. That the stern of the vessel is toward the Oregon shore.

Q. That is, assuming that she was an anchored vessel, that would indicate what with reference to the swing?

A. Of course, if he saw the two lights, which he would see, why then he could determine if she was lying crosswise of the channel—if he could see the two lights.

Q. And it would indicate that she had swung towards the Oregon shore, would it not?



(Testimony of Captain Julius Allyn.)

A. Yes it would, because the riding lights, as they call them, forward is higher, and the other one is low, and one is twenty feet higher than the other; something like that; the forward light is twenty or thirty feet higher than the after light, they call it.

Q. Is there any shadow from the hills on the Oregon shore on a cloudy night when the clouds are over the whole sky, no stars or moon out?

A. Every night has its own peculiarity; it is a pretty hard thing to say, sometimes. Last night was a night no shadow on the water, and it was cloudy; other nights there would probably be clouds and might be shadows; shadows pretty hard to determine.

Q. Do you know what makes the difference?

A. No, I don't know as I do, I am not enough of a weather man.

Mr. McCAMANT.—I think that is all, Captain.  
Witness excused. [262]

TESTIMONY OF CAPTAIN GEORGE Mc-  
NELLY, FOR THE "BOSTON MARU."

Captain GEORGE McNELLY, a witness called in behalf of the "Boston Maru," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. KING.)

You are a licensed Columbia River pilot?

A. Yes, sir.

Mr. SNOW.—We admit his qualifications.

(Testimony of Captain George McNelly.)

Q. How many years have you served as Columbia River pilot? A. Nearly fourteen.

Q. At the present time you are engaged in the service of what company?

A. Luckenbach Steamship Company.

Q. That is the company operating these large intercoastal vessels coming in here? A. Yes.

Q. You pilot their vessels up and down the river?

A. Yes, sir.

Q. And you are familiar with the channel of the Columbia River and the Willamette River between Portland and Astoria? A. Yes.

Q. Will you state what places there are to anchor a vessel outside of the fairway, say a four hundred-foot vessel, between Portland and Astoria?

A. Well, Oak Point. A ship—a loaded vessel drawing twenty-six feet or twenty-eight feet; there are very few places where a ship can swing clear around, but at some stage of it she will be in the fairway anywhere.

Q. Assuming that the night was clear and a vessel was anchored abreast of Columbia City light, on the range, Columbia City front range light, and a vessel was coming down the St. Helens bar range, a ship four hundred and ten feet long, how far away do you think the anchor lights of the anchored vessel could be made out, how many thousand feet? [263]

A. That would depend on the atmosphere and the quality of the light.

Q. Well, assume that they are regulation Government lights, good bright lights, and that the visi-

(Testimony of Captain George McNelly.)

bility right above the water was good, and the night was dark, cloudy, no wind.

A. If there were no confusing lights, no other lights, that should be visible at least two miles.

Q. You mean by that, Captain, that they would be able to see the lights, or would be able to make out that they were anchor lights?

A. Be able to see the lights.

Q. How far away do you think the vessel would have to be before you could make out that they were anchor lights?

A. That would have to depend, in my opinion, on the location and the position they were from you, whether they were up between you and the shore, or out in the clear where you have a clear vision of the water.

Q. What is the fact as to whether or not when you are coming down the St. Helens bar range there is any obstruction between you and the water right off and abreast the Columbia City range lights?

A. There is nothing to be called an obstruction, hills or anything of that sort; there are other lights there, aids to navigation.

Q. Now, assuming that the "Boston Maru" at this particular time and under the weather conditions I have described, and the tide being slack or just beginning to flood, how far away, or how much distance would you require to be up stream from the "Boston Maru" if she were athwart the channel, in order to pass her—to deflect the course of your vessel so as to pass her the other side? [264]

(Testimony of Captain George McNelly.)

A. Well, would depend on the position of my vessel at the time.

Q. Assuming that your vessel was pursuing a straight course at the time, and her bow was pointed midships to the anchored vessel.

A. Not over twelve hundred feet.

Q. Twelve hundred?     A. Yes.

Q. Will you kindly indicate to the Court the approximate point on the St. Helens bar range where you would turn off and leave that range in coming down with a ship of the type of the "West Keats," about four hundred ten feet long, and drawing twenty-six feet aft?

A. Right in about there some place.

Q. That is about opposite the Columbia City mill?

A. Just about.

Q. Just about abreast the Columbia City mill?

A. Right along in there some place.

Q. Right here?     A. Yes.

Q. I have marked the point fixed by the witness on "West Keats" Exhibit 1, "Point of turning, Captain McNelly," Now, when you had reached the point that you have just indicated, would you at that time be able to determine the position of the anchored vessel and its approximate distance from the shore, how far it was off the shore?

A. Not positively; it would depend upon the weather, and I will tell you why. Coming here you haven't got a clear vision of this shore line; the shadows, or the dark shade of the hills doesn't show you the water; it would show dark way out there;

(Testimony of Captain George McNelly.)

where if I came down here you gradually change your course; you see a ship don't come right around immediately; you change your course, and by the time you was probably down here and had lined up on your course, then you could tell; if you could [265] see daylight or other light through there, it would tell you.

Q. Will you mark, Captain, the point where you say you have settled on your new course?

A. As soon as I have straightened up on my course down parallel with the shore.

Q. Will you mark a little cross on the chart there?

A. Up here some place. At the time I am coming across there.

Mr. KING.—Witness made a small cross on the chart "West Keats" Exhibit 1, which I have marked, "Point where straight on new course, Captain McNelly."

Q. And you say at that point, Captain, that you would then be able to make out the distance the anchored vessel was from the shore? A. Yes.

Q. If you had at that point made out the distance the anchored vessel was from the shore, would you then be able to pass between the "Boston Maru" if she were resting in the place shown on this chart, on the Washington side?

A. I certainly would; I certainly would, yes.

Q. What do you consider to be the channel abreast of Columbia City range lights, what portion of the river?

A. I consider the whole deep water the channel;

(Testimony of Captain George McNelly.)

but the rule—as a rule we run about the center. I always do. I think the rest of the pilots do about the same.

Q. Which side of the deep water portion of the river, the Washington or the Oregon side, do you usually navigate there coming down the river?

A. Coming down I usually navigate the right-hand side—coming down.

Q. And going up, which side do you navigate?

A. I navigate the right-hand side, unless everything is clear. What I mean by that is, if there is not any ship in sight coming down I usually take the port hand side of the channel, [266] and cut off. I do that to save time. If there is a ship coming down I follow my own starboard side of the channel, around the bend, and come up the Oregon side.

Cross-examination.

(Questions by Mr. SNOW.)

Coming down the river then, if there is no ship at anchor you usually keep out pretty well towards the center, or even to the Washington side?

A. Aim to keep just about in the center.

Q. If there is a ship at anchor, do you usually aim to pass on the Oregon side, or the Washington side, of that ship?

A. Any ship that I have ever passed at anchor there, I have passed on the Oregon side.

Mr. McCAMANT.—Coming down?

A. Coming down. Any ship that I ever remember of seeing anchored out there, I have always passed on the Oregon side coming down.

(Testimony of Captain George McNelly.)

Q. In fact, the customary anchorage is over towards the Washington side, isn't it?

A. I have always understood it that way, as a rule.

Q. And the customary ship's channel is over towards the Oregon side?

A. Well, the water is deeper closer to the shore on the Oregon side than it is on the Washington side; more sloping on the Washington side.

Q. In keeping out towards the center you give yourself plenty of water and keep to what you consider to be the starboard side of the channel you follow, don't you?

A. Yes, as long as there is no obstruction; no ships in there.

Q. You have passed ships at anchor there a good many times, have you?     A. Yes, sir. [267]

Q. Several times at least?     A. Yes.

Q. Ordinary rate of speed. That is, do you maintain your speed in passing them?

A. Always have; yes.

Q. If you were going full speed you would not slacken in order to pass them?

A. Unless they had barges or logs alongside that the swells would do damage to; we would slow down for that reason, but no other reason.

Q. Coming up, you see you keep to the port hand of the channel if there is no ship coming down?

A. I do that, yes, I run that way.

Q. But, of course, if there is a ship coming down

(Testimony of Captain George McNelly.)

you would yield to them the starboard side, and would take your starboard side?

A. Keep on my own side of the channel.

Q. In pursuance of the ordinary passing rule?

A. Yes.

Q. The narrow channel rule?      A. Yes.

Q. Coming up, if there are ships at anchor, would you usually pass on the Oregon side?      A. Yes.

Q. How do you anchor vessels at that point, Captain? Do you use the red range, so called?

A. Well, I used to use those two red lights; they formed a range before that light was taken away.

Q. I refer to the time two years ago, when this accident happened.

A. Yes, those two red lights, before the front one was taken away; I used that once or twice before it was taken away, coming down, getting the way off your ship, and give more of a cant, but I used that when I had two lights in range with the bridge, and when I aimed to let go the anchor. [268]

Q. The two red lights?      A. Yes, in range.

Q. That was before the light at Point 28-2 on the chart, was removed and put further down the river, with the extension of the jetty?      A. Yes.

Q. That put you about how far out from the Oregon side, anchoring on that range?

A. I had nearly a thousand feet; I don't remember accurately, but I had something like that, perhaps, I was out.

Q. Let us measure that, Captain, it is marked on



(Testimony of Captain George McNelly.)

the chart. Can you find a continuation of the red range there, the yellow line?

A. This dotted line here is the thirty-foot contour.

Q. Take it out there from the thirty-foot contour or shore line, whichever you see fit.

A. About eight hundred feet, I should judge.

Q. About eight or nine hundred feet?

A. Yes, at least eight hundred feet from the thirty-foot contour.

Q. I think it is nine hundred feet, isn't it, Captain?

A. It might be; I didn't measure it accurately. I have a thousand feet this time.

Q. You have a thousand feet from the thirty-foot contour?

A. Well, it can't be very far off; according to that it is nearly a thousand feet.

Q. About nine hundred and fifty feet?

A. I should say nine hundred feet anyway.

Q. And you were measuring from the thirty-foot contour to the line of the red ranges opposite lower Columbia City range light? A. Yes, sir.

Q. You made two red crosses on this chart, Captain. The first one is marked "Point of turn Captain McNelly." A. Yes.

Q. What am I to understand that point represents? Is it the [269] point where you turn from the St. Helens range?

A. It is the point, yes, where you would give the quartermaster your order to change your course.

(Testimony of Captain George McNelly.)

Q. That being in the manner you customarily *you* would run that range?

A. Yes, the way I do run it.

Q. All pilots might not run it exactly the same way? A. Oh, no, certainly not.

Q. There is no one way that can be called entirely right? A. No.

Q. Now, the second point is marked, "Point where start on now course." And what do you mean by that, Captain?

A. That would be about the time that you would steady your vessel and get her on a straight-away course.

Q. And you were now heading down the Oregon bank with the purpose of picking up the Columbia City range astern a little further along, are you?

A. Well, yes or no. I really don't pay much attention to that light going down.

Q. To the Columbia City? A. No.

Q. You don't? A. No.

Q. You pick up another range when further down, do you?

A. Further down; Martin Island range, further down.

Q. How far is Martin Island range from Columbia City? A. About three miles, I judge.

Q. How far do you have to travel before you come on that Martin Island range?

A. From the time you leave the St. Helens range, a mile and a half, I should judge, possibly a little more. This is just an estimate. What is called

(Testimony of Captain George McNelly.)

this old Columbia City range, it shows on this chart, and we have been calling the Columbia City range [270] here with a deep draft ship it is not practical to run it.

Q. Is that coming up the river?

A. Either coming up or going down, you cross that range and come below it, and run on the other one, the new Martin Island range.

Q. Are you referring to the present time, Captain? A. Yes.

Q. Or at the time of this collision?

A. The present time.

Q. There have been some changes made in that Columbia City range light, haven't there? Hasn't that light been moved or changed in some way?

A. Only the rear range on the St. Helens bar, but not the old original Columbia City or Martin Bar range, we call it. Now, whether they still use—we were using this range at this time I don't know, but I am of the opinion that we were not.

Q. Which range do you call attention to now, the Columbia City range or the Martin Island, St. Helens? I have been confused in listening to you.

A. You asked me, I believe, how far down before I came on to the Martin Island range.

Q. Yes, I asked that question, and you said a mile and a half.

A. Yes, and that we cross this range and come back on to another one, in fact, you cross this twice.

Q. By "this range" do you mean the Columbia City range?

(Testimony of Captain George McNelly.)

A. It is called the Columbia City range.

Q. You crossed that twice in order to get the Martin Island range?

A. Before you get to the Martin Island range you cross that range twice with a deep water ship.

Q. You don't follow it?

A. No, we went over twenty-five feet as a rule. No, I don't [271] follow it.

Q. If you are coming up the river, Captain, and want to keep to the right-hand side of the channel—suppose something coming down, and it is night, what range do you get on to approach Columbia City? Don't you use the Columbia City range for that purpose?

A. Well, I run a great deal by the draft of the ship that I have, in regard to the ranges; probably won't pay any attention to those ranges at all; come up to that Martin Island range; strike that above the red light on the end of the jetty, and then head for these lights, or leave them a little bit on the port bow; below Caples Point is a shoal in there, and if you run this existing range that is here now, below Caples Point, it throws you over close to the shoal.

Q. That is why you don't like to run that Columbia City range, is it? It throws you close to the shoal below Caples Point?

A. Below Caples Point; yes, sir. I think the chart shows about twenty-five or twenty-six feet of water on that range. I don't believe it shows any more than that; that is, if I am right.

Q. Now, coming back, Captain, to a vessel com-

(Testimony of Captain George McNelly.)

ing down the river, having left the St. Helens bar range at a point marked by you as turning point, and having steadied away on her course, and headed down the Oregon bank at the point marked, as a straight course, at that point where you are straight on the course you would have a view down the river, wouldn't you?     A. Yes, sir.

Q. And would see the bank on the left-hand side and see the water on the right-hand side. And if it was a very dark night and very cloudy, it is possible you might not be able to see the water or the bank, or be able to tell just where you were [272] headed?

A. I have never seen it so dark that you couldn't make out the water unless there was high land that throws a shadow on it. No, you get a clear view for a distance down the water. You can always make out the water. Now here, continuation of this chart, the river makes the bend, and there are high hills, of course, they are a long ways back, but from this point looking down in there there are shadows come up there that you couldn't see—there might be water enough between some object out here, we will say a vessel at anchor—there might be plenty to go in there, but you couldn't see it from this point of view, with the ship between you and these hills, where, if the ship was over there, there is some low land, and you will get a clear view.

Q. In other words, if the ship was in the place marked, "Position at collision," you might not be able to see it, but if the ship was over in the custo-

(Testimony of Captain George McNelly.)

mary anchorage ground, you would be able to see that stretch of water. Is that correct?

A. Be no trouble about making out a ship anchored there.

Q. Could see her lights, of course?

A. Could see her lights, but the question would be whether you would see water between her and the shore or not.

Q. And that I understand is problematical if she were pretty close to the shore, is it?

A. Well, there are certain angles that you look at a vessel or anything, that way, that you can't see possibly—you won't see the shore line for perhaps six or eight hundred feet out from the shore. The shadow will throw out there and you couldn't pick out the shore line accurately, not to tell where it was; you can't see a thing, just like looking into a black pocket exactly. [273]

Q. Now, this Oregon bank at that place is high, isn't it? A. Yes.

Q. And throws a shadow, doesn't it? A. Yes.

Q. And makes it difficult to see?

A. It does if you are looking towards the hill, yes.

Q. And makes it difficult to judge the distance?

A. Well, I would say so, yes; if a man wanted to go close to shore, I would think so.

Q. And it would be hard to tell how far a light was from the shore, that is, if it was pretty close? Concede if it was way out in the anchorage ground it would be easy to tell, but if the light was close it would be very hard to tell, wouldn't it?

(Testimony of Captain George McNelly.)

A. If the light was inside of that shadow the only thing a man in that place would have to gauge the distance from shore, would be this range light—this front range; that is on the shore there; I would say it would be impossible for him to make out the shore line.

Q. You could only gauge then the distance between the stern riding light of the ship at anchor, and the front range light of the Columbia City range. Is that correct? A. I would say.

Q. Are you sure that the front range light is visible from up the river? Isn't it screened from that point? A. That light is visible.

Q. There is some sort of a screen behind it?

A. Yes, there is a target, but the light is hoisted above the target. Now that you call my attention to it, that is the new St. Helens range, the new channel that they have dug; a man coming down there and heads directly for that light, throws him right on that range. [274]

Q. That last statement has to do with the conditions that exist to-day? A. Yes, sir.

Q. And after the changes that have been made in the last year or two?

A. Yes, the conditions as they exist now.

Q. Now, touching the question of judging the distance between the front range light of the Columbia City range, and the stern light of the ship at anchor, off that light, wouldn't it be difficult to judge that distance from the point you have marked where straightaway on your course? A. It would.

(Testimony of Captain George McNelly.)

Q. On a dark night? A. It would.

Q. Might it be misjudged a distance of a hundred or a hundred and fifty feet? A. Very easily.

Q. Might it be misjudged a greater distance than that? A. Yes.

Q. Two hundred or two hundred and fifty feet?

A. Well, I wouldn't say as to that. It is very easy for a man to misjudge distance at night, when it comes to a light.

Q. Especially with a dark bank throwing a shadow?

A. The atmospheric conditions make all the difference in the world in gauging distances with lights.

Q. And it is very difficult for a man to give expert testimony in the courtroom here of a situation existing on some certain night, without having right in your own mind, from experience, the exact appearance of that situation that night, isn't it?

A. It is, yes.

Q. Some pilots run the St. Helens bar range out a little further than you do, don't they, Captain?

A. Yes, sir.

Q. That is just a difference in methods, peculiarities? A. Yes, sir. [275]

#### Redirect Examination.

(Questions by Mr. McCAMANT.)

Captain, suppose a pilot navigating a vessel drawing twenty-six feet, four hundred ten feet long, coming down the Columbia River on a dark night,



(Testimony of Captain George McNelly.)

cloudy night, although the visibility is good, runs off his St. Helens bar range and straightens out in the river at or near the point indicated by you as the place where you would have straightened out, and he sees ahead the anchor lights of a vessel anchored at substantially the point indicated as the anchorage ground of the "Boston Maru," and is unable to tell because of the gloom cast on the river by the hills back, what the distance is from the stern of the "Boston Maru" to the Oregon shore, what would prudent navigation suggest that that man should do?

A. That would depend in my estimation whether he knew whether he had water enough to go on either side of the ship.

COURT.—Suppose he didn't know anything about the water, just saw the vessel there?

A. Sees the vessel in front of him, and he don't know whether he can get by it either side; it is his place to get the way off the ship and quit going, but according to—as near as I understand, this pilot undertook to go on this side, supposed he had plenty of room. As I say, I don't see anything else for a man to do down there with a ship, and he don't know which side to go on, why the only thing to do is to quit; get the way off the ship and stop her.

Q. Suppose he is familiar with this chart and the other chart showing the depth of the water between the bow of the "Boston Maru" as anchored there, and the shoal marked on this plat, and he is familiar with the other things; he sees [276] the other

(Testimony of Captain George McNelly.)

things outlined in my last question, what would prudent navigation suggest that he do?

A. Well, prudent navigation from my point of view would have been to put his helm to port and gone outside the ship.

Q. On the Washington side of the "Boston Maru"?

A. Yes, if he knew positively that was a ship; could make out his position and make out the ship's position.

Q. Well, there would be nothing to prevent him from seeing that there was a ship at anchor at any time after he got straightened out on his other course, would there?

COURT.—I think the pilot testified he knew he *was* a ship at anchor when he passed this range light here. That he *where is* testified that he saw the ship and knew it was a ship at anchor.

Q. Assuming, Captain, that a pilot navigating a ship four hundred and ten feet and drawing twenty-six feet of water at the point to which I direct your attention, that is the cross-mark made by Captain Berry, and recognizes that he sees a ship at anchor at the point where the "Boston Maru" was lying, as indicated on this chart, what would prudent navigation suggest that he should do, in view of that fact?

Mr. SNOW.—One moment, please. The evidence does not show that he recognized that the ship was at that position. He recognized it to be a ship at

(Testimony of Captain George McNelly.)

anchor, but he didn't know what position it was in.

A. From that point I would say that he couldn't tell the position the ship was in, if he did recognize; he might recognize her as a ship, but from here, on account of this bend in the river, he couldn't tell whether she was there or five hundred feet further out, I should judge from looking at this point. [277]

COURT.—In view of that fact, what would a prudent navigator do?

A. Well, knowing the width of that channel, I would say he would come right along just the way he did; the channel is plenty wide, he would naturally suppose was plenty of room to go on either side of the ship.

Q. Now, this is the point which you said you would recognize the position of the "Boston Maru," is it not?

A. I think one would be able to recognize the position there, when you made your turn parallel with the course down here, right there; by the time you got squared away down parallel with the shore.

Q. Will you tell us how far that is from the position of the "Boston Maru"?

A. It is over three thousand feet, over half a mile.

Q. Over half a mile? A. Yes.

Q. Would there be any difficulty from that point, over half a mile from the "Boston Maru," to pass on the Washington side of the "Boston Maru"?

A. Not that far away.

(Testimony of Captain George McNelly.)

Q. And suppose for some reason that the pilot didn't recognize the danger involved in the situation at that time, but that he did when he was fifteen hundred feet away. What course should he pursue, in your opinion?

A. That would depend on how he was headed at the time. For illustration, we will say this: The "Boston Maru" here, the pilot coming down here. I don't know anything about the position of the "Boston Maru" at all, but from the evidence. Now if the pilot coming down was headed in here to go under his stern, the less his chance would be to port his helm and go around the bow. If he was headed for the center of this [278] vessel he could do it much easier. The idea of any position, it doesn't make any difference where, if a man is headed for the stern of this ship and then changes his mind and starts to go around, that is a great deal harder than it is to go this way. You must have more room. If he is headed for the center of this ship, twelve hundred feet in slack water, no tide to set you down on the bow of the vessel, I would say would be ample room to change the course and get clear with perfect safety. If you are headed in this direction it is a different thing.

Q. There has been some testimony, Captain, to the effect that the pilot of the "West Keats" discovered the position of the "Boston Maru" when he was twenty-one hundred and fifty feet away. Would there be any difficulty in passing to the Washington side of the "Boston Maru" if the situa-

(Testimony of Captain George McNelly.)

tion became apparent at a distance of twenty-one hundred and fifty feet?

A. I wouldn't think so.

Q. Regardless of how the "West Keats" is headed.

A. I wouldn't think so, coming down the channel; that would be ample room.

Recross-examination.

(Questions by Mr. SNOW.)

If the pilot of the "West Keats" discovered when twenty-one hundred and fifty feet away from the "Boston Maru," that the "Boston Maru" was too close in to the Oregon shore to allow safe passage there, and at that time the "West Keats" was headed for the stern of the "Boston Maru," it would require a rather sharp maneuver, would it not, Captain? A. It would.

Q. To pass the bow, considering there is anchor chain there to look out for, as well. [279]

A. At what distance away, please?

Q. Twenty-one hundred and fifty feet.

A. No, sir.

Q. Wouldn't require pretty sharp maneuvering?

A. No, sir. The "Boston Maru" is lying at slack water, practically her anchor chain is up and down; there isn't tide enough to swing her; she is a loaded ship, and the wind has no effect on her, practically. Her anchor chain is practically up and down.

Q. Pretty hard to say how her anchor chain would be?

(Testimony of Captain George McNelly.)

A. Yes, that is true; but it is supposed, as a rule, that is the way a ship will lie; a loaded vessel, she will lie pretty near over her anchor at slack water; a light vessel will pull, will strain at the chain; but twenty-one hundred feet is a long ways; two thousand feet is a long ways; you can put an awful swing in a ship in two thousand feet.

Q. Of course a pilot coming down the river might not be assumed to know that she was loaded, and I think we may assume that he did not know how her anchor chain would lead, except he knew which end was the bow and which end was the stern?

A. Yes.

Q. Wouldn't he have to take the anchor chain into account while he was figuring on a maneuver of that kind? A. Certainly would.

Q. And he would have to allow for it, anyway, regardless of whether straight up and down or not, wouldn't he? A. Yes, sir.

Q. Wouldn't that give him a sharper curve to make than any he has to make in the Columbia River piloting from the mouth of the Willamette River to Astoria? A. No, sir.

Q. Well, where is there a sharper curve than that, Captain? Are there very many? [280]

A. There isn't very many, but there are some that are shorter than that. Altoona is a shorter turn than that.

Q. Altoona. Is that the same as Harrington Point?

A. Harrington Point, yes, has a sharp turn.

(Testimony of Captain George McNelly.)

Q. Do you know the radius of that turn, Captain?

A. No, I don't.

Q. There is a pretty sharp turn going into Bugby Hole, isn't there?

A. There is the old channel; yes.

Q. Not quite so sharp now?

A. Oh, no, not the new.

Q. Isn't there a place called the Pancake Point along the river some place?

A. Yes, in the old channel; we don't run that now. That was a very sharp turn also; Bugby Hole is very sharp.

Q. The Harrington Point Altoona turn can be taken as the shortest turn from the mouth of the Willamette to Astoria, can it, practically?

A. Well, here is a turn right here shows on this chart, would be as sharp as that.

Q. Which turn is that?

A. That turn right there, where you come down here.

Q. You are pointing now to the turn at the head of St. Helens jetty, are you?     A. Yes.

Q. I have a tracing here, Captain, I will ask you to put on the blue-print with the lines of the tracing falling over the corresponding lines of the blue-print, and the lines will superimpose. Now there is the outline of the "Boston Maru" at anchor, which place, through a mistake, does not fall exactly over the outline of the "Boston Maru" at anchor on the blue-print, but close enough for comparison. Now here is a [281] curve drawn here, Captain, from

(Testimony of Captain George McNelly.)

a distance of two thousand feet; from the beginning of the curve to the "Boston Maru"; now that curve is shown here, isn't it?     A. Yes, sir.

Q. This appears to be the radius of that curve?

A. Yes, sir.

Q. All of that can be determined by a pair of dividers?     A. Yes, sir.

Q. This radius is thirty-one hundred feet on the same scale. Now notice where that curve leads on the sixth fathom line, over on the Washington side?

A. Yes.

Q. Right at this point. Would not that require very sharp maneuvering to get the "West Keats," a loaded vessel, back into the channel if he steered a curve of that kind?

A. I am of the opinion you can put the "West Keats' " helm hard aport right there and you could have her around here in half that distance.

Q. But wouldn't she be very apt to run ashore over on the Washington side?     A. Why no.

Q. Could you whip her back in time?

A. Why certainly; that is my opinion.

Q. Do you know what the radius of the curve at Harrington Point is? I think you testified you didn't.     A. No, I don't.

Witness excused. [282]



TESTIMONY OF HARRY L. CHASE, FOR  
THE GOVERNMENT.

HARRY L. CHASE, a witness called in behalf of the "West Keats," being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

Q. You are one of the Columbia River pilots?

A. Yes, sir.

Q. How long have you held your license, State and United States?

A. United States for about, oh, twenty-six years; state license for six years.

Q. Do you belong to the Association?

A. Which association?

Q. Columbia River Pilots Association?

A. Yes, sir.

Q. Your name was mentioned this morning, Captain, as being the originator of the custom of using so-called red range, and anchoring opposite Columbia City? A. I did.

Q. Will you describe how you anchor a vessel—at what point you anchor at that locality?

A. Well, I always get the—

COURT.—Referring to the fall of 1924, and prior to that time.

A. Yes, I understand. I would get the ship abreast the Columbia City front range and go out

(Testimony of Harry L. Chase.)

until the red range comes on; I am on the red range and have the Columbia City front range abeam.

Q. By red range you mean the red light at the end of the St. Helens jetty, and the other red light further up?

A. At the time of this accident, yes.

COURT.—How long had the red ranges been in existence at that time?

A. I don't quite remember, but something over a year; possibly sixteen or eighteen months prior to that time. [283]

Q. What is the customary anchorage ground at that locality?

A. That is customary, as far as I know, the description I gave you.

Q. Other pilots use the same method of anchoring?

A. I don't know what they use, I am sure.

Q. You have passed vessels at anchor there?

A. I have.

Q. Found them anchored over towards the Washington side?

A. Apparently in the same place I anchor.

Q. Where is the main ship channel at that locality?

A. All ship channel wherever it is deep.

Q. Do vessels navigating up and down the river, do they customarily navigate on the Washington or Oregon side at that point?

A. Usually the Oregon side. I have—in fact very nearly all the time on the Oregon side.

(Testimony of Harry L. Chase.)

Q. That is on account of the ranges converging?

A. Yes, the range light is there; they come up and pick up the range and follow along that shore line, quite close along that shore line.

Cross-examination.

(Questions by Mr. KING.)

In the month of October, 1924, were you familiar with this so-called red range? A. Yes.

Q. And were you using that at that time to anchor vessels there? A. Yes.

Q. Just when, before the month of October, had you anchored a vessel there, and what was her name? A. I don't remember.

Q. Are you positive that prior to the month of October, 1924, you had used the red range anchoring a vessel there? A. Yes, quite so.

Q. And you are positive that prior to the month of October, 1924, as a discoverer of this fact, you had disseminated this information [284] among the pilots?

A. No, sir, I don't know that I talked to them as a body. I talked to them—

Q. As individuals from time to time?

A. I don't know. I didn't give it out to anybody; told them I had used that range for anchoring on; may have talked with one or two; just casually; nothing in any particular.

Q. That is, general information among pilots?

A. Just general information; maybe one or two

(Testimony of Harry L. Chase.)

I talked to I told them I generally used that in anchoring there; not what they used.

Q. You had imparted that information to some one pilot prior to October, 1924?

A. I might have, but not that I remember of.

Q. You are sure you made the discovery prior to October, 1924?

A. I had used that prior to that time.

Q. Now there is no anchorage ground designated by any port authorities there, is there?

A. No, sir, not that I know of.

Q. The pilot uses his own method in anchoring there?      A. I think so.

Q. That is a fact?

A. I can only speak for myself.

Q. You have no information which leads you to believe they have adopted any common method of anchoring there?      A. No, sir.

Q. Captain, you were called as a witness before the federal inspectors on the 17th day of November, 1924, with respect to the hearing on the license of Captain Gildez and Captain Berry. Do you recall that?      A. Yes, sir.

Q. And do you remember you were sworn and gave testimony at that time?      A. Yes, sir. [285]

Q. Do you remember having been asked these questions, just to refresh your recollection—you remember they had some charts of the river there at the hearing, don't you?      A. Yes, sir.

Q. The same chart that was issued in October, 1924, that they have here. Have you seen this one?

(Testimony of Harry L. Chase.)

A. Haven't seen this one.

Q. I will show it to you. "West Keats" Exhibit No. 1. Will you examine that chart as to its date, which you will find in the corner, and state whether or not you recognize it as the blue-print of the same original as the one that was there at the hearing of the federal inspectors.

A. I don't know whether the same chart or not.

Q. Not the same blue-print, but the same chart, as far as you can say? A. As far as I can tell.

Q. Shows about the same lights, is that right?

A. Yes, sir.

Q. Do you see the red range on this chart?

A. Those two lights here, that one and this one.

Q. This light 28-2 and light 27-2?

A. Yes, sir.

Q. That is the red range? A. Yes, sir.

Q. And that appeared on the chart up there, did it?

A. Yes, sir, as far as I remember, it did. I think I ran a line.

Q. You ran a line up there, you think?

A. I think so.

Q. Do you remember you were asked these questions and you answered as follows: "How long have you been a Columbia River Pilot for ocean vessels?"

A. Four and a half years. Q. Have you ever anchored any vessels below St. Helens or Columbia

City? A. Yes, sir. Q. Will you show us on this chart about where you consider the anchorage to

be down around that place? A. Indicates on chart

(Testimony of Harry L. Chase.)

Exhibit 'B.' ” We haven't that here. “Q. How wide is the channel there for deep sea vessels, from the Oregon shore line across, [286] where ships drawing twenty-eight to thirty feet of water can go? A. I should judge about two thousand feet, or maybe a little more. I keep the light on St. Helens courthouse a little open, and on Lamont's Point this way (indicates on Chart Exhibit B).” Do you remember giving that testimony?

A. Yes, sir, more or less; not the lighthouse, the courthouse in St. Helens, and the light on Lamont's Point I use in daytime.

Q. That is what you use in the daytime?

A. Yes, sir.

Q. Why don't you use that at night?

A. At night-time nothing to show where the courthouse is. Not lighted up, anyway, not illuminated.

Q. “About how far from the shore would that make your anchorage? A. In the neighborhood of a thousand feet or eleven hundred feet.” Did you make that answer?

A. I guess so if it is there; I don't remember.

Q. “You always anchor in that vicinity? A. Yes, those are the marks I used.” Did you give that testimony? A. Yes, sir.

Mr. KING.—Now, I suppose you will object unless I read all of this. Want me to read all of the testimony in?

COURT.—Let him testify on the stand, don't read his testimony.

(Testimony of Harry L. Chase.)

Mr. KING.—What I mean, I have read it through, and that is the only position he gives for anchoring the vessel down there. Now, if counsel is insistent he gave anything else, I will read the whole thing in. I ask him to examine that and point out where he gives anything else about how to anchor a vessel.

Redirect Examination.

(Questions by Mr. SNOW.)

In testifying before the inspectors at that time did you observe the red range as a method of anchoring [287] there to, as well as the St. Helens courthouse? A. I did.

Mr. KING.—Then I think I want to put in this record the whole testimony.

COURT.—File it without stopping to read it.

Mr. SNOW.—The testimony I know, from having read it myself, is incorrectly transcribed. I don't like to admit that this is actually the testimony given at that place, because I know lots of mistakes in there, from my own knowledge; that puts me in a little bit of a difficult place. I would be glad to go over it with counsel and endeavor to agree with him. I will do my best to stipulate with you, and think we can agree in some way.

COURT.—Captain, something has been said about the extension of this jetty and the change of this red light.

A. No extension of this jetty; this jetty has been put in here, and this light here has been moved down here; that is a short jetty.

(Testimony of Harry L. Chase.)

COURT.—Is this light you refer to one side of the red light?

A. Yes, sir; these two lights here, I mean; they intersect the same as the courthouse and Lamont Point.

COURT.—When was that light moved down to the jetty?

A. Since that accident.

COURT.—Since the accident?

A. Since the accident.

COURT.—At the time of the accident was here?

A. Right here where this chart shows.

Witness excused. [288]

Mr. McCAMANT.—We offer in evidence two certificates executed by the Japanese Consul at this port, certifying that the records in his consulate show the owner of the "Boston Maru" to be as alleged in our libel; an issue was raised on that question.

(Certificates marked "Boston Maru's" Exhibits "O" and "P.")

Mr. McCAMANT.—We now offer in evidence testimony taken by deposition of S. Sayeki, H. Yokoi, Isokicha Chigu, Toyoji Tornita, N. Komi-yama.

We offer in evidence this chart of the Columbia River, including the part of the Columbia River in which this collision occurred, showing that it was issued under date of August 18, 1926, by the United States Coast & Geodetic Survey; we have marked in red on it the shoal that is mentioned on the other



(Testimony of Captain George F. Gildez.)  
chart; put in solely for the purpose of showing the continued existence of that shoal.

(Marked "Boston Maru" Exhibit "Q.")

Whereupon proceedings herein were adjourned until ten o'clock to-morrow morning. [289]

Thursday, October 8, 1926, 10 A. M.

Mr. KING.—At this time, in connection with the testimony of Captain Chase, before the Inspectors, on November 7, 1924, I desire to make a statement: Mr. Snow and I have agreed that the testimony which I read into the record yesterday, from the hearing before the Inspectors, constitutes the only reference to the manner and place of anchoring a vessel which Captain Chase gave before the Inspectors, as shown by the notes and transcript of the reporter. But Mr. Snow questions the accuracy of the transcript, and desires to offer a little evidence on that later on. [290]

#### TESTIMONY OF CAPTAIN GEORGE F. GILDEZ, FOR THE "BOSTON MARU."

Captain GEORGE F. GILDEZ, a witness called in behalf of the "Boston Maru," being first duly sworn testified as follows:

Direct Examination.

(Questions by Mr. KING.)

Captain, you are a Columbia River pilot?

A. Yes, sir.

Q. For how many years have you been acting as a Columbia River pilot?

(Testimony of Captain George F. Gildez.)

A. A little over four years.

Q. During that time have you been a member of the Columbia River Pilots Association?

A. Yes, sir.

Q. Now, prior to the time that you became a Columbia River pilot, what experience had you had with respect to navigating the Columbia River and the Willamette River between Portland and Astoria?

A. Since 1910 I have been pilot, master, of various boats on the Columbia River.

Q. Since 1910?      A. Yes, sir.

Q. And has that experience enabled you to become familiar with the course and channels and depths of water in the Columbia River?

A. Yes, sir.

Q. And during the four years that you have been a Columbia River pilot, what have been your duties with regard to navigating vessels up and down the Columbia River?

A. Taking vessels from Astoria to Portland, and way points between Astoria and Portland.

Q. These are all large sea-going vessels, are they?

A. All sea-going vessels, yes, sir.

Q. Now, on the 25th day of October, 1924, did you take charge of the "Boston Maru," to take her to St. Helens?      A. Yes, sir.

Q. Where was she lying when you went aboard her?      [291]

A. Clark-Wilson mill at Linnton.

Q. About what time did you go aboard?

(Testimony of Captain George F. Gildez.)

A. About five-thirty.

Q. And you left down the river?

A. About five-forty, or five forty-five.

Q. What time did you arrive opposite Columbia City?

A. About eight-thirty, I would say.

Q. That is, eight-thirty P. M.—all those times?

A. All those times are P. M.

Q. Just explain to the Court how you would go to St. Helens. Probably I had better hand you this chart. Now what was the state of the tide when you arrived by St. Helens?

A. Ebb, tide, about half tide, I should say.

Q. What was the stage of the river as to whether high or low at that time? A. Low, water low.

Q. Low stage of the water?

A. Low stage of the water; yes.

Q. How much water was the "Boston Maru" drawing when you proceeded down the river?

A. Twenty-six feet one inch.

Q. What was the condition of the vessel with respect to whether she was fully loaded, or only partial load, and if so, how much?

A. She was very near loaded; she was going into St. Helens for about one day's work, for lumber.

Q. She was practically down to her marks?

A. Very close; yes.

Q. When you arrived off Columbia City what was the condition of the weather, was it dark?

A. Dark, yes, very dark.

(Testimony of Captain George F. Gildez.)

Q. What was the condition of the clouds? Were there clouds, or a moonlight night? [292]

A. Cloudy and dark, squally, rain squalls.

Q. I lay before you a chart marked "West Keats" Exhibit 1. Will you kindly point out to the Court just how you came down the courses there, and how you handled your vessel in coming to anchor?

A. You want to start up in here some place?

Q. Yes. A. Came down by St. Helens range.

Q. That is St. Helens bar range?

A. St. Helens bar range; came down off Columbia City; went down here and was abreast of these three lights, St. Helens range lights and Columbia City range lights.

Q. Could you see the shore?

A. Not very distinctly; you could see the lights.

Q. Then what did you do with your vessel?

A. Swung around.

Q. Which direction?

A. To the starboard. Drew towards the Oregon shore, the bow, until got right crossways about abreast of front range light Columbia City range, and anchored right out about the center of the channel, abreast of the front range of the Columbia City range—range light of the Columbia City range.

Q. I direct your attention to the shoal on this chart, "West Keats" Exhibit 1. Will you state to the Court whether or not you were familiar with

(Testimony of Captain George F. Gildez.)

that chart at the time you brought the vessel down the river?     A. Yes, sir.

Q. State to the Court whether or not you knew of the presence of the shoal as shown by this chart.

A. Yes, sir, we had a chart exactly like this in our office at that time.

Q. Had you seen it?     A. Oh, yes.

Q. Captain, for the benefit of the record, state how far—how wide you consider the channel to be off the Columbia City range [293] light you have just mentioned?

A. About twelve hundred feet.

Q. When you refer to the channel, what do you mean, what portion of the river?

A. Well, the channel—the thirty-foot contour is the channel, where your vessel will float, thirty-foot contour line.

Q. Now, is there a tide there that comes up to Columbia City?     A. Yes, sir.

Q. And in the low stage of the river there is tide at Columbia City, is that right?

A. Yes, sir.

Q. Is that tide sufficient to cause a vessel to swing on her anchor?     A. Yes, sir.

Q. Can you tell in advance which direction she will swing, assuming she is anchored in the river there?     A. No, sir.

Q. Whether toward the Oregon shore or the Washington shore?

A. Not unless there is a wind blowing.

(Testimony of Captain George F. Gildez.)

Q. Now, was the stage of the wind—how strong wind was there that night?

A. Wasn't very much wind; I wouldn't say how strong; it was, but scarcely any.

Q. Taking the conditions as you have described them up there that night, could you tell at the time you came to anchor which way your vessel would swing? A. No, sir.

Q. And what was your purpose in anchoring at the spot you have indicated there?

A. Well, we were bound for St. Helens; there was not water enough between St. Helens and Columbia City to get to St. Helens in low tide; we had to wait for the tide, high tide, very near, to get in.

Q. Why did you aim to place your vessel near the middle of this thirty-foot channel there, as shown by the contours?

A. So in case she swung either way the vessel would stay clear of the shore. [294]

Q. Now, at the time that you brought the vessel to anchor, who gave the directions as to when the anchor should be dropped? A. I did.

Q. And was the anchor dropped then?

A. Yes, sir.

Q. And then which way did the vessel swing on her anchor, was it upstream of her anchor, or downstream?

A. She was downstream, ebb tide.

Q. Ebbing tide? A. Ebbing tide, yes, sir.

Q. Were any anchor bearings taken?

(Testimony of Captain George F. Gildez.)

A. Yes, sir.

Q. What time were those taken?

A. Generally after we anchor; I would say around nine o'clock, approximately.

Q. Who were they taken by? I mean, did you take them yourself?

A. The second mate took them under my supervision.

Q. Who indicated the lights towards which the bearings should be taken? A. I did.

Q. Was the vessel comparatively steady in the river at the time the bearings were taken?

A. Yes, sir.

Q. She had come to rest in more or less a general direction? A. Yes, sir.

Q. Now, at what time was it, about, when you completed taking the anchor bearings?

A. Around nine o'clock, I would say, approximately.

Q. When the vessel stopped and dropped her anchor, what was done with respect to her running lights?

A. Her running lights were turned out and the anchor lights put out in their place.

Q. Did you see these anchor lights in place at that time? A. Yes, sir.

Q. Where was the one placed aft?

A. On the flagstaff. [295]

Q. Where was the one that was placed forward?

A. On the forestay.

Q. Now, after the vessel came to rest and her

(Testimony of Captain George F. Gildez.)

anchor lights were hoisted and these bearings taken as you have indicated, what did you do?

A. I went down in the saloon and laid down.

Q. Did you give any instructions as to when you should be awakened?     A. Yes.

Q. What time did you direct them to awaken you?

A. About one—two o'clock we were to leave.

Q. Were you subsequently awakened, and if so, in what manner?

A. I was awakened by the ship rolling very heavily.

Q. What did you do?

A. Got up and went on deck.

Q. Had you taken off your clothes?

A. Oh, yes, yes.

Q. And did you stop to dress before you went on deck?     A. No, sir.

Q. When you got on deck what did you see? First, did you look to see what the cause of this disturbance was?

A. I looked around and couldn't see anything.

Q. Which side of the vessel did you look from?

A. Both sides.

Q. Now, did you observe the position of the "Boston Maru" at that time?     A. Yes, sir.

Q. When you came on deck?     A. Yes, sir.

Q. With respect to whether she was lying in the same place she was before?     A. Yes, sir.

Q. What position was she then resting?

A. She was lying with her stern towards the



(Testimony of Captain George F. Gildez.)

Oregon shore, at an angle of about, I would say, forty-five degrees with the channel, with the shore line.

Q. In other words, she was forty-five degrees upstream from where she was?

A. Her stern was. [296]

Q. When she was tailing downstream at the time you went to bed?

A. Her stern was; yes, sir.

Q. Her stern had turned towards the Oregon shore that far? A. Yes, sir.

Q. Now, at the time you came to anchor, did you give an order as to how much chain should be let out with the anchor?

A. Yes, thirty fathoms.

Q. Was that amount let out? A. Yes, sir.

Q. Now Captain, you have had experience in handling vessels of much the same type as the "West Keats"? A. Yes, sir.

Q. And you know the general characteristics of the way in which such vessels will steer when going at full speed? A. Yes, sir.

Q. The testimony in this case, I believe, shows that the "West Keats" was going either 8:84 miles per hour, or ten miles per hour, according to different witnesses. Assuming that the "West Keats" was proceeding down the St. Helens bar range, and had turned off to go over on to the Columbia City range in the usual manner, how far away would she have to be in order to make a turn to go on either side of the "Boston Maru," if the "Boston Maru"

(Testimony of Captain George F. Gildez.)

was then athwart the channel? How many feet away upstream would she have to be to make that maneuver?

A. To be headed directly for the "Boston Maru," and going steady? Is that the proposition?

Q. Yes.

A. About a thousand or twelve hundred feet, I would say.

Q. Would that be a dangerous maneuver in your opinion?

A. Not if he were over a thousand feet.

Cross-examination.

(Questions by Mr. SNOW.)

In answering the last question, Captain, did you assume the "West Keats" headed directly into midships of [297] or at some other part of the "Boston Maru"?

A. Well, that is midships.

Q. Midships? A. Yes, sir.

Q. And you also assumed, didn't you, that the "Boston Maru" was lying at an angle of forty-five degrees to the direction of the course of the "West Keats"?

A. I believe the attorney said athwart the channel.

Mr. KING.—I asked him athwart the channel, perpendicular.

Q. By athwart you meant perpendicular?

A. I understood she was athwart ships of the channel.

Q. If the "West Keats" were pointed at the

(Testimony of Captain George F. Gildez.)

stern of the "Boston Maru," or just off the stern of the "Boston Maru," in order to turn safely without executing a dangerous maneuver to pass the bow of the "Boston Maru" and leave plenty of room for the anchor chain, the "West Keats" would want more than twelve hundred feet, wouldn't it?

A. No, sir.

Q. You think that could be done at twelve hundred feet? A. I think I could do it.

Q. Safely?

A. I think I could do it all right.

Q. How would you do it?

A. Put my wheel hard aport and if necessary could back the vessel.

Q. Would you set the engines full speed astern, or half astern, or how?

A. Full speed astern if necessary.

Q. The "West Keats" backs to port, doesn't she?

A. Her stern goes to port, her bow falls to starboard.

Q. Setting the engines astern would help that maneuver a lot? A. Oh, yes.

Q. Would help her get around? A. Yes.

Q. She would swing then, and miss the bow of the "Boston Maru"? A. I think so. [298]

Q. Isn't it possible that she might not respond to her helm quite as quickly as you conceived, and that she might cut the "Boston Maru" in two, or smash head on into her?

A. Those things are always possible with a ship.

Q. If that happened it would be a lot more seri-

(Testimony of Captain George F. Gildez.)

ous accident than the one that occurred, wouldn't it?

A. Undoubtedly so; could have been much worse than it was, sure.

Q. Could have been lots worse?

A. Yes, oh, yes.

Q. She might have sunk the "Boston Maru." Is that not a fact?

A. Could have been done, yes, sir.

Q. And a turn of that kind might possibly have resulted in such a sinking, might it not?

A. Not in that fairway; as long as the machinery worked all right, everything worked according to what they are supposed to do, I don't think would be much danger.

Q. If everything worked perfectly and the pilot of the "West Keats" knew exactly where the "Boston Maru" was, and how far away he was from the "Boston Maru," and didn't misjudge it any distance, or scores of other affecting circumstances, you think it would have worked all right, do you?     A. Yes, sir.

Q. But if something went wrong he might have crashed into the "Boston Maru" and sunk her; isn't that a fact, in attempting such a swing?

A. Yes, that is a fact. Any time you are coming up or down the river with a ship something might go wrong and you might crash into something.

Q. If they had crashed into the "Boston Maru" and sunk her, there might have been lives lost? That is a fact?

(Testimony of Captain George F. Gildez.)

COURT.—That is a speculation, pure speculation.

A. Certainly. [299]

Q. When you anchored the “Boston Maru” you gave orders to let out thirty fathoms of chain, did you? A. Yes, sir.

Q. Did you give the order thirty fathoms in the water, or thirty fathoms on the windlass?

A. Thirty fathoms on the windlass.

Q. On the windlass? A. Yes, sir.

Q. So, really the amount of chain in the water was less than a hundred and eighty feet?

A. Oh, yes, the distance from the windlass to the water-line.

Q. The distance from the windlass to the water. When you anchored the “Boston Maru” you aimed to anchor her at a place which you called the middle of the channel? A. Yes, sir.

Q. And what did you consider the channel to be?

COURT.—He said he considered it twelve hundred feet wide.

Q. To what point did you consider the channel to extend?

A. To the thirty-foot contour on both sides of the river.

Q. Do you refer to the thirty-foot contour on the Washington side of the river, or the thirty-foot contour as shown on the chart, surrounding the so-called shoal?

(Testimony of Captain George F. Gildez.)

A. Thirty-foot contour on both sides, one thirty-foot contour to the other, about twelve hundred feet.

Q. But you didn't answer my question exactly, as to which thirty-foot contour you mean?

A. Both sides.

COURT.—He said he referred to both, on both sides of the river.

Q. You mean both the same place?

A. One on both sides of the river.

Q. Two on the Washington side of the river?

A. Not thirty-foot contours.

Q. There are three; I call your attention to them.

[300]

A. Not three thirty-foot contours on one side of the river, that is impossible.

Q. There is one on the Oregon side, that is this line here, with five dots?

A. That is the thirty-foot contour, six fathoms.

Q. Here is one I follow with my pencil on the Washington side.

A. That is true, one on either side of the river.

Q. One on either side of the river. Here is another, here is the other end which makes the edge of the so-called shoal.

A. Yes, sir; that is the thirty-foot contour around that shoal there; there is one on the other side, which would make four; one on either end, which would make six, if you want to take them all.

Q. Those additional thirty-foot contours are on the Washington side of the river, are they not?

A. Yes, sir.

(Testimony of Captain George F. Gildez.)

Q. Now, when you aimed to anchor at the middle of the channel, so-called, which thirty-foot contours did you refer to? Did you eliminate entirely the thirty-foot contours surrounding the so-called shoal? A. No, sir.

Q. What were you considering?

A. The thirty-foot contour on the Oregon shore to the first thirty-foot contour across the river.

Q. Is that the thirty-foot contour surrounding the shoal?

A. That would be one surrounding the shoal; yes.

Q. So then what you considered the channel extends between the shoal and the Oregon shore?

A. Yes, sir.

Q. You knew, in fact, however, that that shoal so-called had never interfered with anchoring a vessel, didn't you?

A. In just what way do you mean? I don't understand that question.

Q. Had you ever heard of a vessel going aground on that shoal when anchored, swinging on the anchor?

A. No, sir; but a vessel would go aground on that shoal if swung on top of it. [301]

Q. You feel pretty sure she would?

A. If she drew more water than there is on the shoal, no doubt of it.

Q. Did you fear at the time you anchored the "Boston Maru" that it might swing on that shoal?

A. Yes, sir.

Q. You testified, I believe, that you didn't know,

(Testimony of Captain George F. Gildez.)  
when you anchored the "Boston Maru," which side she would swing to with the current or tide?

A. I didn't.

Q. You didn't know. Did you know she would swing at all? A. No, I didn't.

Q. You thought she might hang straight on her anchor until you got ready to leave that place?

A. Well, you don't know—nobody knows just exactly at what time the tide will turn; weather conditions control the tide for the matter of an hour, make it an hour early, or an hour late, so we don't know just exactly *what* the tide will turn, various sized tides; big tides or small tides will make it earlier.

Q. So by examining your tide-book you only find out the influence on the tides of the moon and attractions, but you can't find the weather conditions? A. No, sir.

Q. And a strong wind outside of the Columbia River will pile up a higher tide than usual?

A. Yes, sir.

Q. So you feel you don't know when you anchor a vessel which way she is going to swing, or whether she will swing at all? A. Yes.

Q. You testified before the inspectors, didn't you, on November 7th? A. Yes, sir.



(Testimony of Captain George F. Gildez.)

Q. I will ask you whether or not this question was asked and answered: "You knew that when you laid down, if she swung at all, it would be across the ship's channel? A. From the way the wind was blowing when I laid down, she would swing the other way." Did you give that answer?

A. Yes, sir. [302]

Q. I will ask you whether or not this question was asked and this answer given: You say a wind blew when you went to bed which would swing towards the Washington shore? A. "Yes, sir."

A. Yes, sir.

Q. Did you mean to testify at that time that you thought she was going to swing towards the Washington shore?

A. At the time I laid down I did; yes, sir.

Q. But you now want to be understood as saying that you didn't know at that time whether she would swing at all, or which way she might change?

A. The wind has a perfect right to change in any direction; matter of three or four hours from the time you anchor. It could have changed to the other side before she turned.

Q. You testified just now that when you anchored her you didn't know which way she was going to swing, or whether she would swing at all, didn't you? A. I didn't know; no, sir, I did not.

Q. I understand you to say that; what did you say?

A. How did I answer that question — I beg

(Testimony of Captain George F. Gildez.)

pardon. I didn't know how was going to swing, that is what I mean; which way going to swing.

Q. That is the way you want to be understood as testifying now? A. Yes, sir.

Q. But you did testify before the Inspectors that you thought she would swing towards the Washington shore because of the wind?

A. I did. When I laid down I thought she would swing towards the Washington shore because the wind was from the Oregon shore.

Q. But now you testify—

COURT.—Now he testifies he didn't know which way she was going to swing—what he thought and what he knew.

A. I want to make myself clear: When I laid down was probably [303] nine-thirty; the time she would swing would be between one and two o'clock, matter of probably three hours, three and a half hours, and the wind was from the Oregon shore when I laid down; but it might change. Wind does change, and it might have changed in most any direction, two o'clock or one o'clock, and I couldn't be sure which way was going to swing.

Q. Is that all the explanation you want to make of that? A. Yes, sir.

Q. There was a customary anchorage ground at that general location in the river at that time, was there not, Captain? A. Yes, sir.

Q. And that was over towards the Washington shore, wasn't it?

(Testimony of Captain George F. Gildez.)

A. Well, I would say was very close to the middle of the channel.

Q. You were familiar, then, with this red range, weren't you?     A. No, sir.

Q. You were not?     A. No, sir.

Q. Had you not anchored a vessel on it by putting Lamont on the courthouse?

A. In daytime I had, yes.

Q. And you knew that carried you well over to the Washington side, didn't you?

A. That doesn't carry you very far over from where I was, probably two hundred feet from where the position of this vessel was.

Q. You have a chart before you, Captain?

A. Yes, sir.

Q. Will you say is two hundred feet from a line extended from the courthouse through Lamont on to the end of the channel, to the place where your vessel was anchored?

A. About three hundred feet.

Q. From what point are you measuring?

COURT.—From that line you marked here to measure.

A. That line there. [304]

Q. That is three hundred feet, is it?

A. About three hundred feet, yes, sir.

Q. Now, the course from—Captain, at the time you anchored there, could you have made out Lamont and the Courthouse?     A. No, sir.

Q. It would be too dark?     A. No, sir.

(Testimony of Captain George F. Gildez.)

Q. You couldn't have used that method of figuring? A. No, sir, you couldn't see the courthouse.

Q. Did you ever anchor on the line from Caples Point to Lamont? A. No, sir.

Q. And you never anchored on the red range?

A. No, sir.

Q. Did you think when anchoring you were getting on that line from Lamont to the courthouse?

A. Never entered my head at all. I couldn't see the courthouse and I had no use for the line at all.

Q. The only thought you had in mind was keeping far enough away from either bank to keep from swinging on the bank, was it? A. Yes, sir.

Q. Did you have that shoal with twenty-five-foot soundings especially in mind when you anchored?

A. Yes.

Q. And you didn't want to swing on that?

A. No, sir.

Q. You knew, didn't you, that that twenty-five-foot sounding represented the zero mark of the river? A. Yes, sir.

Q. And you knew the water then was a foot and a half above zero, didn't you?

A. Knew was a little above zero; yes, sir.

Q. You knew the vessel would not swing until the tide came in considerably, didn't you?

A. Yes, sir—well, the tide doesn't raise a great deal before she swings.

Q. How much tide is there at that point, or was there that night? A. At high tide or low tide?

(Testimony of Captain George F. Gildez.)

Q. Well, what was the difference between high and low tide at that [305] point?

A. At that time three or four feet.

Q. And at what point would the vessel swing with that rising tide?

A. Very close to low water; just after low water.

Q. Swing as soon as the tide began to come in?

A. As soon as the tide begins the flood she swings.

Q. Of course you can't tell me just when she did swing, can you, Captain? You were asleep then, weren't you? A. I was asleep.

Q. Had your experience with anchored vessels led you to believe that they will swing as soon as the tide starts to come in?

A. As soon as the tide starts to flood, they will start to swing.

Q. And you knew at that time, didn't you, that there was plenty of water for your vessel to swing over that twenty-five foot sounding without touching bottom? A. No, sir, I didn't know it.

Q. Well, you knew was plenty of water there even at lowest tide, didn't you? A. No, sir.

Q. What was the draft of your vessel?

A. Twenty-six foot one inch.

Q. Twenty-six foot one inch? A. Yes, sir.

Q. Was that forward or aft? A. Aft.

Q. What was it forward?

A. I don't remember; a little bit less forward.

Q. Was about twenty-four feet, wasn't it, in fact?

A. Was a little less than it was aft, I remember. I don't remember exactly.

(Testimony of Captain George F. Gildez.)

Q. The deepest part of the vessel was twenty-six feet two inches?     A. Twenty-six foot one inch.

Q. You knew the water at that place marked twenty-five feet was in fact twenty-six and a half feet at that time, at low water?     A. No, sir.

Q. Don't you keep track of the various stages of the river at [306] different times of the year?

A. Yes, sir; the river at Portland was one foot and six inches above zero, but it was not that high at St. Helens; probably a foot above zero at St. Helens, because further down the river.

Q. What was the stage of the water at Astoria at that time?

A. Their tide was the only stage of the water at Astoria.

Q. I mean what was the stage of the water above zero at that time?

A. It is above or below zero; no difference in the stage of the water only tidal stage.

Q. So the height of the water makes no difference at Astoria; just tidal effect?     A. Just the tide.

Q. You are positive of that?     A. Yes, sir.

Q. And the height of the river gradually fades from maximum at Portland to nothing at Astoria?

A. Yes, sir.

Q. So you consider the stage of the river was a foot above zero at this point?

A. About a foot, yes, sir, at St. Helens.

Q. If your ship turned on that twenty-five foot sounding at exactly low tide, she would strike it by an inch, then?     A. Yes, sir.

(Testimony of Captain George F. Gildez.)

Q. You knew, didn't you, that she would not turn on low tide?

A. Would turn immediately after low tide.

Q It is the coming in of the tide that causes a ship to swing on her anchor, isn't it? A Yes, sir.

Q. Rather than the wind? The wind does not have much effect on it?

A. No, would not have much effect, on a ship loaded as that was.

Q. The current has a more powerful influence than anything?

A. Yes, sir, a ship of that draft.

Q. Fully loaded? A. Yes, sir.

Q. Now, by anchoring a little further down the stream you could very easily have avoided that shoal place, couldn't you? [307] A. Yes, sir.

Q. And anchoring further over towards the Washington shore, and further down, you wouldn't have been in any danger from that twenty-five foot sounding at all, would you? A. No, sir.

Q. Even if she swung to the Washington shore?

A. No, sir.

Q. You knew the main ship channel was on the Oregon side, didn't you?

A. The main ship channel down the thirty-foot contour not on the Oregon side at all.

Q. You knew the ranges there on the Oregon bank, didn't you? A. No ranges at this place.

Q. You don't mean to deny the existence of the St. Helens Bar range and the Columbia City range, of course?

(Testimony of Captain George F. Gildez.)

A. The St. Helens Bar range and the Columbia City range are not used after pass Columbia City.

Q. Not used? A. Not used as ranges.

Q. They are not? A. No, sir.

Q. So you think the pilot made a mistake if he used that?

A. I am not here to estimate what a pilot does. I am just saying what I would do.

Q. You want to be understood as testifying that Columbia River pilots don't any of them use that range?

A. I am not testifying for Columbia River pilots, sir.

Q. You said not used.

A. I am speaking for myself alone.

Q. You don't use ranges in navigating the river at that point? A. No, sir.

Q. Now, of course you understand, Captain, we are speaking of the river as it was then?

A. Sure, I understand that.

Q. Not later changes. A. This chart here.

Q. At that time, assuming a vessel anchored at that point, would you have taken a vessel like the "West Keats" down the river there past that place?  
[308]

A. Coming down we come on St. Helens Range to a point about abreast of these Columbia City Mill lights and head right off down the middle of the channel towards the lights at Kalama, until we picked up the lower Columbia City Range, and went off on that.



(Testimony of Captain George F. Gildez.)

Q. How far would it be from the place that you would leave the St. Helens Bar Range until you would pick up the Columbia City Range below?

A. Quite a ways; half a mile, I should judge.

Q. Half a mile?      A. I should say.

Q. There would not be more nearly a mile and a half, or two miles?      A. Might be that.

Q. Great deal of difference between those two distances, Captain; you ought to advise yourself.

A. About a mile—no, about half a mile is right.

Q. What is that?

A. About half a mile—no, wait a minute; about a mile, sir.

Q. Now, you would leave the St. Helens Bar range abreast the Columbia City Mills dock?

A. Yes, sir.

Q. And that is the dock on the Oregon side, marked with a tower immediately back, shown as High Tower?      A. Yes, sir.

Q. And a mile from the point of leaving that range—you would there travel down the middle of the river and reach the Columbia City Range a mile below, would you?

A. About a mile below, yes, sir.

Q. Nautical mile or statute mile?

A. I don't know what those are.

Q. Don't that map show?

A. Statute mile, I believe, on this map.

Q. Distance not shown that far down on this map.

A. You understand where I get my limit; this chart has half mile circles on it here, and I took one

(Testimony of Captain George F. Gildez.)

of those for measurement; [309] might be a little more, and might be a little less.

Q. One of the times you testified before the Inspectors, before you learned of the position of the "Boston Maru" as shown by the ship's bearings, didn't you express the judgment to the Inspectors that you had anchored about six or seven hundred feet out from the Oregon shore? A. Yes, sir.

Q. But you changed that opinion when a later location with bearings showed the "Boston Maru" to have been about nine hundred feet out?

A. Yes, sir.

Q. How did you arrive at that figure, six or seven hundred feet? Was that your estimate?

A. That was my estimate that night.

Q. So you thought you were anchored about six or seven hundred feet out from the Oregon shore?

A. Yes, sir.

Q. What was your idea, Captain, of going in that close to the Oregon shore, in view of the two ranges converging at that point?

A. In figuring there, put the ship right cross-wise of the river with her stern towards the front light of the Columbia City range, she will come to anchor and she will swing downstream past that light and swing clear there; being out that far from the Oregon shore I was positive she would be clear of the Washington shore, as no lights on it; no way of estimating how far you are from the Washington shore.

Q. When you anchored there you didn't give

(Testimony of Captain George F. Gildez.)

much consideration to the use of that Oregon side of the river as a channel; as much as you did to having your own vessel safe from going ashore on either bank, did you?

A. No, sir. That was exactly what I was on the vessel for, to look out for the safety of the vessel I was aboard.

Q. You didn't make any special effort, then, to get the vessel out of the fairway? [310]

A. Couldn't make any effort; if I anchored a ship had to anchor in the fairway some place.

Q. In fact, if you had gone a little below and further out, you would have been just as safe with your own vessel and would have been entirely away from the fairway, wouldn't you?

A. Not in my estimate, no, sir.

Q. You would have been entirely away from the Oregon shore?

A. I would have been as safe—I would have been out of the way, probably, more, but my ship wouldn't have been as safe, or I wouldn't have known she was as safe as she was.

Q. You wouldn't have known she was as safe?

A. No, sir.

Q. But looking at the chart now, you realize she would be as safe?

A. Not that night. I would do the same thing, anchor that same place if I had to do it over again.

Q. You would anchor the same place?

A. Near the same place, for the safety of my own ship.

(Testimony of Captain George F. Gildez.)

Q. And you feel, then, in anchoring a vessel, the safety of that vessel is the first consideration and not the obstruction of the channel?

A. I don't feel I obstructed the channel, sir.

Q. You know there is a law against obstructing the channel, don't you, the fairway?

A. I don't feel that I obstructed the channel, sir.

Q. You know that the river is wider and deeper just below that front Columbia City light than it is immediately opposite, don't you?     A. Yes, sir.

Q. Had you at that time often passed vessels at anchor in that general vicinity?

A. I had passed them there, yes, sir.

Q. Coming up the river or down the river?

A. Both ways. [311]

Q. Have you passed them on the Oregon side or the Washington side?

A. I can't ever recall passing a vessel on the Washington side.

Q. The only recollection you have of passing vessels there, you were on the Oregon side of the anchored vessel?     A. Yes, sir.

Q. And in going to the Oregon side, did you go to the Oregon side of the anchored vessel by passing from one range to the other—to the other along the Oregon shore? That is to say, have you ever passed vessels there at night?

A. Yes, I have passed vessels there at night.

Q. When you were on the Oregon side?

A. Yes.

Q. Going up the river or down the river?

(Testimony of Captain George F. Gildez.)

A. I can say both ways there, too.

Q. Well, coming down the river then, passing such vessels, did you come down the St. Helens Bar Range?     A. Yes.

Q. And leave that range to go on the Columbia City Range?     A. Yes.

Q. Following along the Oregon shore in the interim between?

A. Didn't follow along the Oregon shore; passed between the vessel and the shore.

Q. Passed between the vessel and the Oregon shore?     A. Yes, sir.

Q. Coming up you do the same thing in reverse, do you?     A. Yes, sir.

Q. And those vessels were far enough over to the Washington shore to give you clearance, were they?     A. Yes.

Q. In fact, it is customary for pilots in anchoring vessels in that place to anchor far enough to the Washington shore to give clearance, isn't it?     A. Yes, sir.

Q. If you had anchored further over to the Washington shore on this occasion, you would have given better clearance, wouldn't you?

A. I would on one side, but would not on the other side; I [312] intended to anchor in the middle of the channel, give clearance on both sides; if the ship would swing one way, would clear the channel on one side; if the ship swung the other way, would clear the channel on the opposite side. That was my intention when I anchored there.

(Testimony of Captain George F. Gildez.)

Q. You did that regardless of the fact that the customary channel is nearer the Oregon side than the Washington side?

A. I did that because I didn't know which way the ship was going to swing.

Q. But you knew which way ships go up and down the river, didn't you, and you knew that was nearer the Oregon side than the Washington side?

A. At that time I was not bringing ships up and down the river; I had a ship anchored at Columbia City which I had to look out for. I was responsible for that ship, the one I anchored at Columbia City.

Q. You had been a pilot on the river two years prior to that time?

A. Four years—two years—take that back.

Q. Two years prior to that time?     A. Yes, sir.

Q. Four years at the present time?

A. Yes, two years at that time.

Q. When did you first get your Government pilot papers?     A. About 1909-'10.

Q. When did you first get your state branch?

A. 1922.

Q. When you became a Columbia River pilot?

A. Yes.

Q. Before that time you held the Government license only?     A. The Government license; yes.

Q. What position did you hold on the vessels prior to that time?

A. Master and pilot, mate, deck-hand, and all positions.

(Testimony of Captain George F. Gildez.)

Q. What companies did you work for?

A. For Shaver, for C. R. N., for the Port of Portland, Diamond O. [313] Navigation Company, Crown Willamette Pulp & Paper Company.

Q. What vessels had you been master of before the time you became pilot?

A. "Diamond O." "Pronto."

Q. "Diamond O" and "Pronto." They are both tugs, are they?

A. Yes, they are both tugs. They are all tugs that I have been master of.

Q. What other vessels have you been master?

A. "Georgie Burden"—that is about all, I guess; that's enough.

Q. "Georgie Burden," "Pronto" and "Diamond O" then? A. That's about all.

Q. Those are the three vessels that you have been master of?

A. For any length of time; been on others for short periods, I don't know, of ten days practically.

Q. And this employment in various capacities on river steamers extended from 1909 to 1922?

A. Yes, sir.

Q. Were you in the pilot-house when the bearings were taken on the "Boston Maru"?

A. I was with the second mate, yes, sir.

Q. I believe you said you pointed out to him the various lights? A. Yes.

Q. Told him the names of them? A. Yes.

Q. Did you watch him take bearings? A. Yes.

Q. Did you help him take them? A. No, sir.

(Testimony of Captain George F. Gildez.)

Q. Where were you when the running lights of the "Boston Maru" were extinguished and the anchor lights set out? A. On the bridge.

Q. That was after the anchor was in the water, was it?

A. That was immediately after the anchor was let go.

Q. And while the vessel was swinging as you described? A. Yes. [314]

Q. When was it that you went below after that?

A. About nine o'clock, or a little after.

Q. After the vessel had been anchored for about half an hour?

A. Twenty minutes, or half an hour.

Q. About twenty minutes? A. Yes, sir.

Q. Was the vessel swinging downstream on her anchor at that time, at the time you went below?

A. She wasn't swinging; she was lying stern of the tide.

Q. Not swinging but laying straight?

A. Yes, practically straight, with the stern downstream.

Q. What room did you go to in the vessel?

A. In the saloon.

COURT.—What does that have to do with this collision? Taking up a great deal of time.

Mr. SNOW.—Just to be informed as to the distance of that room from the pilot-house.

COURT.—What difference what room he went to, whether asleep in one room or another?



(Testimony of Captain George F. Gildez.)

Q. What instruction did you give the Japanese officer with respect to calling you?

A. Told them to call me if anything happened is about all I said.

Q. That is about all you said? A. Yes.

Q. Did you tell them to call you in case of fog?

A. No, sir.

Q. You didn't use the word fog? A. No, sir.

Q. Did you tell them to call you in case the vessel swung with the tide? A. No, sir.

Q. Did you tell them to call you in case the vessel swung over to the Oregon side? A. No, sir.

Q. Do you ordinarily, on anchoring vessels, Captain, go to sleep while the vessel is lying at anchor?

A. Yes.

Q. In a place where there is no more anchorage room than there is here? A. Yes, sir. [315]

Q. You testified that you anchored right the middle of the fairway a little while ago?

A. Yes, sir.

Q. You consider the fairway from one thirty-foot contour to the other; do you think it is safe to go to sleep when you are anchored in a position of that kind? A. Yes, sir.

Q. With a changing tide coming along?

A. Yes, sir. Nothing at all that I can do after we are anchored.

Q. If you had been on deck at the time the "West Keats" was approaching, you could have given some sort of signal, couldn't you? A. No, sir.

(Testimony of Captain George F. Gildez.)

Q. Are you familiar with the rule respecting anchored vessels, that they shall give some sort of special signals on occasions when necessary?

A. There is a rule to that effect when it is foggy and thick.

Q. You don't consider that rule is applicable to clear weather? A. No, sir.

Q. You don't know of any rule applying to clear weather requiring anchored vessels to give signals by noise or by lights if necessary?

A. If necessary, yes, but clear night, anchor lights burning, there is no reason in the world why it should be necessary. The man on the other ship can undoubtedly see your lights; he can see you are an anchored vessel then.

Q. So there was no possible reason for application of that rule in clear weather?

A. Not that I know of, sir.

Q. You consider the rule as applicable only to foggy weather? A. Just foggy or bad weather.

Q. Now, if you had been on deck at the time the "West Keats" was approaching you could have started the engines of the "Boston Maru" and kicked her out of the channel very quickly, couldn't you? [316] A. No, sir.

Q. Couldn't you have swung her around so that she would have headed upstream again?

A. No, sir. I heard him testify that one minute they knew there was going to be a collision, the people on board the "West Keats." One minute wouldn't have given the engineers time to get even

(Testimony of Captain George F. Gildez.)

ready, so I wouldn't have known there was going to be any collision any quicker than they did.

Q. Well, if you had been on the stern of the "Boston Maru," looking over at the shore light, you could have made some sort of an estimate as to the distance she was from the Oregon shore, couldn't you?

A. If somebody had told me the "West Keats" was going to run into us I would probably have gone to the stern and put out a duffle-bag over the side, but nobody told me that. I didn't even know the "West Keats" was coming down the river, or any other ship.

Q. Of course, you knew that ships were coming up and down the river from time to time day and night, didn't you? A. Yes, sir.

Q. Did you undress when you went to sleep?

A. Yes, sir.

Q. You were awakened by the jar, or collision, were you?

A. I wouldn't say jar; the ship rolling is what wakened me, by the collision or impact.

Q. You ran up on deck without putting on your clothes?

A. Went out on deck, right on the same deck I was sleeping on.

Q. You were sleeping on the same level as the boat deck, were you?

A. No, it is on the deck below the boat deck.

Q. What did they call that on the "Boston Maru"? A. Called that the main deck.

(Testimony of Captain George F. Gildez.)

Q. Main deck? A. Main deck, yes, sir.

Q. The "Boston Maru" was then lying at anchor forty-five degrees off [317] the Oregon shore, was she? A. About that I would say.

Q. How could you tell that, Captain?

A. By the line, the shore line, and the lights on the shore; the lights ahead of us, the way she was headed; the way the ship was headed principally, looking up along.

Q. Was her stern pointed forty-five degrees downstream, or forty-five degrees upstream?

A. Downstream towards the Oregon shore.

Q. Was she swinging then?

A. Well, I couldn't notice her swinging; if she was, it was very small.

#### Redirect Examination.

(Questions by Mr. KING.)

In answer to some of Mr. Snow's questions you said that if you had anchored your vessel further down below Columbia City lights, you would have had more room. I will ask you whether on a night such as it was, the night of October 25th, when you came to anchor, there was any light or other landmark by which you could have anchored your vessel further down?

A. There was no other landmark or lights that could be seen further down than the front light of the Columbia City Range.

Q. Was that fact the reason that you didn't anchor further down? A. Yes, sir.

(Testimony of Captain George F. Gildez.)

Q. Now, Captain, from your experience have you found that you can safely navigate a vessel down to the very inches of the soundings as shown on the chart?

A. Why, no, you must have water under the bottom of the ship or you can't navigate her.

Q. And is it safe to figure down to the inches upon shoals, in swinging over shoals?

A. No, sir, it is not. We don't figure down to less than— [318] or very little less than a foot, to have water under the ship, because there might be an unevenness at the bottom which they wouldn't get with their sounding leads.

Q. Those soundings are not taken over every foot of the river?     A. No, sir.

Q. You had to have in mind with respect to this shoal?

A. Always have that in mind when going a shoal place.

Q. When any—have any port authorities, or other authorities prescribed any anchorage ground off of Columbia City?     A. No, sir.

Q. When a vessel such as the "Boston Maru," loaded in the manner she was, and under the ordinary conditions that we find existing, is caused to move by flood tide, state to the Court what the fact is with respect to how she moves with respect to the point where her anchor lies?

A. You mean the way she swings?

Q. Well, I don't care which way she swings, but does she strain her anchor chain as she swings?

(Testimony of Captain George F. Gildez.)

A. When no wind, and no tide no stronger than it is at Columbia City, I would say that she does not strain on her anchor chain; she lays downstream at her anchor, and as flood tide comes along she moves up over the anchor straight ahead until the chain comes tight, leading aft; this holds her bow and the stern goes around one way or the other from the pivot of her bow, and the chain holds.

Q. There is one other point: In answer to a certain question of Mr. Snow you said you had passed up and down past this point while vessels were at anchor, and that you had passed them both coming up and down stream on the Oregon side?

A. Yes.

Q. Now, will you state to the Court what the positions of these vessels were at the time you passed with respect to whether they were hanging up and down the river, or were in any manner athwart [319] the channel?

A. At all times I have passed there the vessels were hanging up—practically up and down the channel; sometimes stern with flood tide and sometimes with ebb tide.

Q. Assuming for the purpose of making the record clear that your vessel had been hanging up and down the stream, in your opinion would there have been ample water on the Oregon side?     A. Certainly.

(Testimony of Captain George F. Gildez.)

Recross-examination.

(Questions by Mr. SNOW.)

Did you ever anchor a vessel a little below the front light of the Columbia City Range?

COURT.—At night, you mean?

Q. At night; yes.

A. No, I did not at night.

Q. Don't you think it could be done?

A. Why, yes, most anything could be.

Q. Don't you think you would judge about how far below that light you were anchoring that vessel if you wanted to anchor below?

A. I could make a guess at anything.

Witness excused.

Mr. SNOW.—Mr. Hixon is here and I would like to call him in rebuttal out of order. [320]

TESTIMONY OF R. E. HIXON, FOR THE GOVERNMENT (IN REBUTTAL).

R. E. HIXON, called in rebuttal on behalf of the "West Keats," having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

I hand you "West Keats" Exhibit 1. When was the fixed red light established at the short jetty marked 27-2?

A. Our records show that that dike was constructed in April, 1923, and those lights are always set on the end of the jetties as soon as they are

(Testimony of R. E. Hixon.)

constructed, so they will not be an obstruction to navigation. I was going to say that I didn't have the records of the Lighthouse Service available to say when that light was absolutely established, the exact date, but I know they would always—we build a structure and on the end of the jetty they put a light on it right away after they construct the jetty; the jetty was constructed in April, 1923.

Q. When was the fixed red light established at the end of St. Helens jetty marked 28-2?

A. Well, that is an old jetty, and asking Mr. Clark of the Lighthouse Service this morning when that light was established, he said about 1919.

Q. That light was moved further down recently, wasn't it?

A. It was moved down as soon as this lower jetty shown here as proposed dike No. 28-6 was constructed; the light was then moved to the end of that new dike.

Q. What was the date of that move?

A. That dike was constructed in December, 1925.

Q. I hand you tracing marked for identification as "West Keats" Exhibit No. 2, and ask you if you made that tracing? A. Yes.

Q. As it is made, can it be imposed upon this blueprint? [321]

A. Yes, they are on the same scale, same objects are shown—some of the same objects shown on each.

Q. What does that show with respect to the degree of curve and radius of the curves of a vessel attempting to pass around the "Boston Maru"



(Testimony of R. E. Hixon.)

marked at place of collision, at a distance of one thousand and two thousand feet?

A. Well, it shows that a vessel leaving her course above the "Boston Maru" at a distance of a thousand feet would have to swing on a radius of eleven hundred feet in order to clear that vessel.

Q. And at two thousand feet, what would be the radius?

A. The radius starting at a point two thousand feet upstream would be thirty-one hundred feet.

Q. Now, what is approximately the sharpest curve from the mouth of the Willamette River to Astoria on the Columbia River?

A. Well, we always consider the turn at Harrington Point, or Altoona as it is called, to be the sharpest turn on the river.

Q. What is the radius of that turn?

A. The radius of that turn as a ship would run it would be about three thousand to thirty-five hundred feet.

Q. Now, Mr. Hixon, when the tide turns at this point shown on that blue-print before you, and the water starts flowing up the river with flood tide, when does that upper river flow commence—at the very beginning or turning of the tide, or later on? A. Later on.

Q. At what stage in the flood tide does that up river current come?

A. At the latter part of the flood tide.

Q. For how long does it continue?

A. Oh, I couldn't say exactly.

(Testimony of R. E. Hixon.)

COURT.—You mean at this point?

Mr. SNOW.—At this point, your Honor.

A. I couldn't say exactly. [322]

Cross-examination.

(Questions by Mr. KING.)

You wouldn't want to undertake to say from personal knowledge, absolutely right at this point in the river, would you? A. As to what?

Q. As to the tide. You never made any observations right there at Columbia City, did you?

A. As to the velocity of the tide, do you mean?

Q. As to when it moves, yes, and the current.

A. No, we have measured the currents there to know whether up or down stream, and the ebb tide current more especially.

Q. But not so much the upstream current?

A. No.

Q. Now, with respect to the circles of various radii that you have last mentioned, you have assumed in these different curves that the man would want to pass not only the "Boston Maru" in a perpendicular position to the bank, but also including the full length of anchor chain that she had out, have you not? A. That is the way it is done.

Q. Now, I will ask you, Mr. Hixon, if at about this point on this curve here, a thousand feet now, the master of the vessel would not be safe in setting the ship for reverse curve that would come around like that? I have made a mark there.

Mr. SNOW.—I have no objection to the witness

(Testimony of R. E. Hixon.)

answering that question, but of course he is not a pilot.

A. That would be a matter of navigation. I couldn't be expected to tell you whether that could be done or not; that is a matter of handling the vessel.

Q. As far as drawing curves, though, it could be done?

A. Yes, it would run over her anchor chain, however.

Q. Well, say you came up a little further; the same could be [323] done way back here on this other one where I make the mark "X" on the larger radius or arc?

A. At some point in here the direction could be changed so that the curves could be drawn to pass outside that chain.

Q. And from your own experience you don't know whether a ship turns on an even arc or not, do you? A. No.

Q. It might operate in what is known in engineering terms "on a spiral." Is that right?

A. That is probably so.

Mr. KING.—At this time I wish to offer in evidence "Boston Maru" Exhibit "L" for Identification.

(Marked "Boston Maru" Exhibit "L.")

Mr. SNOW.—And I want to offer in evidence tracing marked "West Keats" Exhibit 2 for Identification.

(Testimony of H. S. Todo.)

Mr. McCAMANT.—We object to that as irrelevant and immaterial.

COURT.—It will be admitted for whatever it is worth.

(Marked “West Keats” Exhibit 2.)

Witness excused. [324]

TESTIMONY OF H. S. TODO, FOR THE  
“BOSTON MARU.”

H. S. TODO, a witness called on behalf of the “Boston Maru,” being first duly sworn, testified as follows:

Direct Examination.

(Questions by Mr. McCAMANT.)

You are connected with what Japanese firm?

A. Suzuki & Company.

Q. And have you charge of the ships that Suzuki & Company look after? A. Yes, I do.

Q. I will ask you whether Suzuki & Company look after the “Boston Maru” when she visits these ports on the North Pacific Coast.

A. Yes, we have charge of her.

Q. Do you on behalf of Suzuki & Company correspond with the owners of the vessels?

A. I do.

Q. And with whom do you correspond as owners of that vessel?

A. To the head office of the owner of that vessel.

Q. And what is the name of the owner?

A. Kokusai Kisen Kaisha.

Q. Isn't there a Kabushiki in the name too?

(Testimony of H. S. Todo.)

A. I beg your pardon; the word before the last is Kabushiki.

Q. What does the word "Kabushiki" mean?

A. Kabushiki, English translation, limited, and to my knowledge it is incorporation in America.

Q. Now, this concern, the owner of the vessel, what is it, a partnership or corporation?

A. It is a corporation.

Q. Japanese corporation?

A. Japanese corporation.

Q. Have you in your hand the certificate?

A. I have extracts of the certificate.

Q. Is it identified by the American Consul at Kobe? A. Yes. [325]

Q. Will you translate the Japanese part of that certificate?

A. "Extract of Register. Register No. 743. Name of firm Kokusai Kisen Kabushiki Kaisha. Kaigan Street No. 8, Kobe head office; date of incorporation, Taisho, the eighth year, July 1st. The directory, the address—

Q. We may omit the name of the directory, may we not?

Mr. SNOW.—Yes.

Q. You may skip the names of the directors.

A. "The undersigned herewith certifies that this is an extract of the original register, the fifteenth year of Taisho, June 3. Signed Kobe District Court, Court Clerk Uyeda, 'I'; and seal."

Mr. McCAMANT.—I offer in evidence the certificate the witness has translated.

(Testimony of H. S. Todo.)

(Marked "Boston Maru" Exhibit "R.")

Q. Now, you have given us a date there; such a date as 8 Taisho. Will you explain what that date means?

A. According to our American way of fixing dates Taisho the eighth year corresponds to 1919 A. D.

Cross-examination.

(Questions by Mr. SNOW.)

Who is the man that signed this certificate—Oh, I notice that is in English. That is a certificate of the Kobe local court in Japan, refers to the corporation and not to the vessel, doesn't it?

A. Correct, the corporation.

Q. And you deal with that same corporation as the owner of the vessel? A. I do.

Witness excused.

Mr. McCAMANT.—I presume our depositions are considered as read.

COURT.—Yes, you may read them in the argument.

"Boston Maru" rests. [326]

TESTIMONY OF CAPTAIN E. H. BERRY,  
FOR THE GOVERNMENT (RECALLED  
IN REBUTTAL).

Captain E. H. BERRY, recalled in rebuttal, having been previously sworn, testified as follows:

Direct Examination.

(Questions by Mr. SNOW.)

Captain Berry, since you are on the witness-

(Testimony of Captain E. H. Berry.)

stand the issues have been somewhat clarified as to the question of what you could see and what you couldn't see as you approached the "Boston Maru." Now, I want you to take the "West Keats" Exhibit No. 1 and, using that to illustrate your answer, tell the Court what you could see at such places as you suggest, taking first—well, tell the Court what you could see of the "Boston Maru" and of the distance which she appeared to be from shore, if you could see any of that during the time that you were passing—after you had left the St. Helens Bar Range and while you were following down the Oregon shore, in order to get on the Columbia City Range.

Mr. McCAMANT.—I object to that as not proper rebuttal. That is part of his case in chief, and we offered no evidence whatever as to what this witness saw.

Mr. SNOW.—Well, there was a lot of expert testimony as to what he could see under the circumstances, and I want this to rebut that testimony.

COURT.—I suppose he can answer.

Mr. McCAMANT.—I make the further objection that the matter was fully gone into by this witness on direct examination in the case in chief.

Mr. SNOW.—I thought he could add just a word to what he said; I am not sure he could.

COURT.—All right; we will take it.

Mr. SNOW.—We want it to be entirely clear to the Court.

A. As I say, coming down the St. Helens Bar

(Testimony of Captain E. H. Berry.)

Range, I got down to [327] the turning point, I saw the ship anchored down here.

COURT.—You saw the ship before you got down here, didn't you?

A. Saw the ship's anchor lights, yes, out here, but I had to get down at the foot of this St. Helens Bar Range before I could line up to see what position the anchored ship was; it was so dark that night I could see no water cover at all; only the ship and the shore. In fact, you couldn't see water any distance and not knowing just how far down she was, of course I couldn't tell—couldn't tell whether there was room enough to put her hard aport and go off to the Washington shore. I could see the Columbia City lower range light; that would be the front light to the Columbia City Range, and it looked to me as though was enough distance—of course that is back on shore two hundred feet from the water—but the distance between that light and the "Boston Maru's" stern anchor light appeared to be room enough for me to go down through there; in fact I thought I had to go down through there, because I had no idea I could go off on the other side.

Q. What lights could you see down below the "Boston Maru," if any shore lights?

A. Couldn't see none whatever. Something more I would like to state, however, in regard to the position of the ship.

Q. Make your statement, Captain.

A. I would like to say that the witnesses hereto-



(Testimony of Captain E. H. Berry.)

fore have been told that the "Boston Maru" was anchored straight out from the Columbia City lower light and they had been asked whether they would have room enough and how much room it would take for them to go off to the Washington shore.

Mr. McCAMANT.—I object to that as argument.

COURT.—Counsel will argue the case.

Mr. SNOW.—I think probably that is argument.

[328]

Cross-examination.

(Questions by Mr. McCAMANT.)

Captain, you say you had no idea you could go between the "Boston Maru" and the Washington shore? A. No, I didn't.

Q. You knew—when you first saw the anchor lights knew the stern light was closer to the Oregon shore than the bow light, didn't you?

A. Yes, sir.

Q. You knew the vessel had swung towards the Oregon shore? A. Yes, sir.

Q. And you were familiar with the channel at that point? A. Yes, sir.

Q. And you knew that there was twelve hundred and fifty feet or more of thirty-foot contour at that point? A. Yes, sir.

Q. And the stern of the "Boston Maru" trailed off toward the Oregon shore; you still had no idea that you could go between the "Boston Maru" and the Washington shore. Is that right?

A. No, I had no idea from the time I could see her that I could make it off there safely. I knew

(Testimony of Captain E. H. Berry.)

was a mile or two wide there, but I couldn't make that turn.

Q. You want to be understood as saying that this collision, in view of the position in which the "Boston Maru" was anchored, was inevitable?

A. Yes.

Q. From the time you saw the "Boston"—you mean to say that you were vigilant as a lookout, do you?   A. I don't just understand.

Q. You were vigilant as a lookout, that is, looking ahead vigilantly to see what was ahead?

A. Yes, sir.

Q. You didn't overlook your duty in that respect?  
[329]   A. No, sir.

Q. You saw the "Boston Maru" and her position as soon as any pilot could have seen her?

A. Yes, sir.

Q. By the time you made out the position of the "Boston Maru" you were too close to her to go on the Washington side?

A. Yes, the Washington side.

Q. And therefore you contend that in view of the position that the "Boston Maru" was anchored this collision was inevitable. Is that so?

A. I thought I could get by her of course until the last moment. Everyone has testified that the channel was down, and everyone has gone down the Oregon side of the ships that are anchored there; none has ever passed on that side but one.

Q. You know now that Captain Moran took a ship down there an hour and a half before?

(Testimony of Captain E. H. Berry.)

A. Yes, a very small one.

Q. Drawing twenty-three feet of water, wasn't she?

A. I never knew her to draw twenty-three feet, although she might if got a load of wheat in her, or something like that, but not general cargo or merchandise.

Q. You heard the testimony drawing twenty-three feet at that time?     A. Yes.

Q. An hour and a half before you came along, he went between the "Boston Maru" and the shoal, didn't he?

A. Yes, he was the only one that ever did it though.

Mr. KING.—You have been a pilot about five years?

A. Yes.

Mr. KING.—And prior to that time you were pilot on a survey boat, were you?

A. No, I was captain of a river boat.

Witness excused. [330]

### TESTIMONY OF MacCORMAC SNOW, FOR THE GOVERNMENT.

MacCORMAC SNOW, a witness called on behalf of the "West Keats," being first duly sworn, testified as follows:

#### Direct Examination.

(Without questions.)

A hearing was held in the office of Inspectors on

(Testimony of MacCormac Snow.)

November 7, 1924, relating to this collision. I attended that hearing and took careful notes of it. Captain Harry L. Case was one of the witnesses. One page of my notes is devoted to his testimony, and I offer my notes in evidence—offer the entire group of notes, but the page in particular in evidence, and ask that they be identified and marked as an exhibit on behalf of the “West Keats.”

Mr. McCAMANT.—I think they are irrelevant and immaterial.

COURT.—It would not be competent evidence of course.

Mr. SNOW.—I am unable to testify of independent recollection that Captain there testified as to the anchoring on the Red Range, but I am nevertheless positive that he did so testify, because I find that in my notes and I took the notes very carefully.

Witness excused.

“West Keats” rests. [331]

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AND there was duly filed in said court the deposition of Anton Bergreth, a witness on behalf of the United States, in words and figures as follows, to wit: [332]

DEPOSITION OF ANTON BERGRETH, FOR  
THE GOVERNMENT.

A. BERGRETH, the witness named in the foregoing stipulation, being duly sworn, on oath deposes and says:

Q. (By Mr. ALLEN.) Your full name is Anton Bergreth? A. Yes.

Q. You reside in the city of Seattle?

A. Yes, sir.

Q. Were you chief engineer on the S. S. "West Keats" on her outward voyage from the city of Portland, on October 25, 1924? A. Yes.

Q. State, in brief, Mr. Bergreth, what experience you have had in maritime matters.

A. I have been going to sea for about twenty-five years; and have held chief engineer's license for about nineteen years. I have been going to sea continuously for all that time.

Q. At this time, October, 1924, you had had your chief engineer's license for how long?

A. About nineteen years.

Q. I will hand you the chief engineer's log of the screw steamship "West Keats," from Portland to Yokohama, and call your attention to page bearing date October 25 and October 26, 1924, and to the signature at the bottom as chief engineer, and ask you if that is your signature?

Mr. COSGROVE.—I object to that unless he identifies the document, as stated by counsel, rather than taking counsel's statement for it.

(Deposition of Anton Bergreth.)

Q. Tell us then, Mr. Bergreth, whether or not that is the chief engineer's log beginning on the voyage mentioned?

A. Yes, sir, that is the rough log.

Q. And noting the date to which I called your attention [333] is that your signature at the lower right-hand corner?     A. Yes, sir.

Q. Prior to leaving the city of Portland proper, or the dock at the city of Portland, did you make any test of the steering apparatus of the vessel "West Keats"?     A. Yes, I tested it out.

Q. Was any entry made in the log?

A. It was entered on the log; yes.

Q. Examine again the log and please tell us whether any entry or notation was made in the log, as to that fact.

A. (Reading from log.) "Tried out engine-room telegraph and steering engine" and found "O. K."

Q. That is upon this same day, October 25th?

A. Yes, sir.

Q. Can you tell from your entry there about the hour?

A. I would say about 10:30 or 11 o'clock.

Q. Now, after your entries as to that test of the steering apparatus, what do these other entries on this page mean?

A. It is marked here "Standby 10:45"; that is a bell the captain rings down to the engine-room to standby the engines to get ready to sail.

Q. What is this O. K. after that?

A. That is on the steering.

(Deposition of Anton Bergreth.)

Q. Do you know who placed that O. K. there?

A. Mr. Gratton, the first assistant engineer.

Q. What are the other entries there?

A. Down below here?

Q. Yes.

A. One is standby 10:45 P. M. and then 10:55, that is slow astern, the engines were turning over slow astern at 10:55. [334] Then have various bells after that; to full ahead at 12 o'clock midnight. All these various bells are entered in the bell-book. I do not have that here.

Q. What is this?

A. That is "Department O. K."; that is J. McLean, third assistant.

Q. What do the hours at the extreme left-hand margin denote?

A. That indicates the different watches.

Q. And the figures in the column denoting the total revolutions is what?

A. That is the total revolutions for that watch, as indicated out here.

Q. Is that the total brought forward?

A. That is the total revolutions during that watch.

Q. In the next column, revolutions per minute indicate what?

A. That is the average revolutions per minute for that watch.

Q. And what then would you say were the number of revolutions per minute commencing at mid-

(Deposition of Anton Bergreth.)

night and in the watch succeeding that hour until the time of the collision with the "Boston Maru"?

A. Well, the average revolutions would be  $65\frac{1}{2}$  revolutions.

Q. (By Mr. COSGROVE.) Are you basing that on the figures you just referred to in the log?

A. Yes, sir.

Q. (By Mr. ALLEN.)  $65\frac{1}{2}$  revolutions per minute is what is shown under the column marked average revolutions per minute, is it not?

A. Yes, sir.

Q. Then going to the right of the watch marked 4 A. M., please read the entries you find there and tell us what they are. [335]

A. At 1:43 A. M. received a stop bell; the main engines were stopped. At 1:45 received a full astern bell; at 1:47 received another stop bell. At 1:48, slow ahead. At 1:49 half astern. At 1:54 full ahead. At 1:56 full astern. At 1:58 full ahead. At 2:01 slow ahead. At three minutes past two, stop. At 2:16 slow ahead. At 2:21 half ahead. At 2:35 full ahead. That is in that watch.

Q. What is this right here?

A. That is the department O. K. L. O. Jet. He was second assistant engineer and on watch during that time.

Q. That watch extended to what hour in the morning?

A. 12 minutes to 4 in the morning.

Q. You mean that Mr. L. O. Jet was second assistant engineer? A. Yes.



(Deposition of Anton Bergreth.)

Q. Was Mr. Jet a man of ability for the position he occupied?     A. Yes, sir.

Q. How long had you known him?

A. I had only known him about, I should say, about a month before he was employed there; but I have his record as a good man.

Mr. COSGROVE.—I move to strike the answer concerning the ability of this gentleman, for the reason it is incompetent, irrelevant and immaterial; and furthermore it is an opinion and hearsay.

Q. Could you tell from working with him whether or not he was competent?     A. Yes, sir.

Mr. COSGROVE.—I renew my motion.

Q. Was he competent? [336]

A. Yes, I found him to be a good man.

Q. What would you say was the speed of the vessel, loaded as she was, and running through fresh water, at the revolution of 65½ revolutions per minute?

A. You mean the speed of the vessel through the water?

Q. Yes.

A. Not figuring the currents or anything, just the vessel going through the water?

Q. Yes. The ship going through the water, what was her speed?

A. I would say between seven and a half and eight knots.

Q. When did you first go to the engine-room, Mr. Bergreth?

A. Immediately after the first bell at 1:43.

(Deposition of Anton Bergreth.)

Mr. ALLEN.—I ask that this log be marked Exhibit “A” to the deposition of A. Bergreth, and I offer it in evidence.

Mr. COSGROVE.—I wish to examine the witness before making my objections to the admission of the log in evidence.

Q. (By Mr. COSGROVE.) Where did this alleged collision take place?

A. When did it take place?

Q. Yes. A. The exact crash?

Q. Yes.

A. I have no idea when that took place; we never felt any crash. It must have been at the first bell.

Mr. ALLEN.—You mean the hour or day?

Mr. COSGROVE.—The hour of the day.

A. It was close on to 1:43 A. M. on the 12 to 4 watch shown to the left there.

Q. Will you please, Mr. Bergreth, referring now to the column under watch 8 P. M., and tell me whether that is your [337] writing in that column or not?

A. No, that is the 1st assistant’s writing.

Q. Tell me whether any writing of yours is in the column under 12 midnight watch—from 8 to 12.

A. These two words here “Full ahead,” is the only writing I did. I made that notation there.

Q. The words full ahead under 12 mid.

A. Yes, sir.

Q. Now, coming to the next column which is, at the left-hand marked 4 A. M., what part of that is in your writing? A. This notation here.

(Deposition of Anton Bergreth.)

Q. The notation which you refer to as yours is "R. T. 2:24" minutes. Stop 16." That is all that is yours? A. Yes, sir.

Q. Now, referring to the column which has 8 A. M. in the left-hand margin, what portion, if any, of that is in your writing? A. The word "various."

Q. The word "various" in the extreme left-hand side of the column is in your writing. A. Yes.

Q. And that is intended to be under what?

A. Under different pressures on receivers.

Q. Intended to be—

A. —under the heading main engine receiver pressure.

Q. In the pressure heading in the perpendicular column. Now, coming to the last horizontal column with 12 noon printed in the extreme left, what portion of that, if any, is in your handwriting?

A. There is none of that in my writing. [338]

Q. Now, at the top part, is any part of that yours?

A. That is all in my writing.

Q. All at the top? A. That is the heading.

Q. The name of the ship "West Keats" and the words Portland, Oregon, following the word from, the word Yokohama following the word toward, and the words Oct. 25-26-24, after the printed word date, are in your handwriting? A. Yes.

Q. And take the heading of the perpendicular columns, you have the words oil pressure, oil temperature, meter, barrels, extra feed and engine oil.

A. Yes.

(Deposition of Anton Bergreth.)

Q. Now, not any of the writing, except what you have specifically mentioned, is in your writing?

A. Except at the botttom.

Q. Down at the bottom "entered in port log," which is in your writing. A. Yes.

Mr. COSGROVE.—I move to strike all the testimony previously given by the witness relative to the entries in this log. Also his testimony based upon entries in the log as to estimated speed. On the ground that the document was prepared and made by others and the testimony is in the nature of hearsay and not founded upon a document properly in evidence. Now, as to the offer to introduce the document in evidence we object upon the ground that it is not the best evidence and it is hearsay. If this motion be denied, then I move to limit the consideration of the document solely to the entries which the witness [339] has testified he made himself. And then, the further motion follows: that the document as limited should be stricken as incompetent, irrelevant and immaterial.

(Log-book marked "West Keats" Exhibit "A.")

Cross-examination.

Q. (By Mr. COSGROVE.) You said, I believe, that the steering gear of the "West Keats" was examined just before the commencement of this voyage?

A. Yes, I would say an hour and a half before.

Q. Did you make this examination yourself?

A. The first assistant and myself, and also the first mate; he is generally present when we make that examination.

(Deposition of Anton Bergreth.)

Q. Well, were you present during all of this examination? A. Yes.

Q. And take part in it? A. Yes, sir.

Q. When did you make all these log entries which you say you made there?

A. When the book was brought up from the engine-room, the say day.

Q. The afternoon of the same day?

A. No, sir. In the morning.

Q. After the collision?

A. After we arrived at pier No. 1 and tied up, back in Portland.

Q. The vessel left Portland when, what time of day?

A. She got away from the dock at 10:55 and we maneuvered around out in the river until midnight; that is at Terminal 4.

Q. Then this trial of the engine-room steering gear was a [340] dock trial?

A. It was alongside the dock; yes.

Q. These entries as to revolutions that you pointed out here are readings taken from time to time?

A. Taken at the end of each watch of four hours. That is where you run a full watch.

A. And they only refer to the total number of revolutions? A. Yes.

Q. And they do not at any time indicate any particular speed at any particular time, but refer to and represent the average speed for that period?

(Deposition of Anton Bergreth.)

A. Yes. The revolutions per minute is the average speed for four hours of actual running time.

Q. Are there any other books kept by your engine department which contain similar entries to the owners that go in this log that you have just shown?

A. There is a port log and a bell-book. The book that all these bells are marked down in and the direction of the engine.

Q. Then all of the entries that would be on this page showing the bells, the time, etc., are usually taken from some other book?

A. If you receive any amount of bells it goes in the bell-book. If you have only a few bells you have enough space there and it is then placed in the log. Sometimes they are copied out of the bell-book into the log, providing that there is space enough.

Q. But you did not enter in here any of these entries with reference to the bells or times?

A. No, sir. [341]

Q. You did not enter in here any of the entries as to the revolutions? A. No, sir.

Q. Where is the bell-book?

A. It is on the steamer "West Keats."

Q. On what part of the ship?

A. It is kept down in the engine-room.

Q. Who has charge of that?

A. I have charge of it. It is down there whenever you expect to have any bells, leaving port or coming into port, the balance of the time it is in my room.

(Deposition of Anton Bergreth.)

Q. Who makes the entries on that book?

A. The engineer on watch.

Q. That book is now on the vessel?

A. It should be on the "West Keats." We are never asked to keep a record of that; that is in the rough; but it is aboard the ship.

Q. Are any of these entries that you usually find on such a page as this, that are taken from any other book?     A. No, sir.

Q. But looking at this so-called log again, do you know what some of these symbols mean?

A. Yes.

Q. I note in the horizontal column which appears to be the 4 A. M. watch, the words "bells x143" what that x mean?     A. Time.

Q. That means 1:43 A. M.     A. Yes.

Q. That is about the time of the collision? [342]

Q. Just prior to that in point of time, as this document appears, the last entry relative to bells seems to be "various bells" to—

A. —Full ahead, midnight. That is when we cleared.

Q. Then there are no other entries on this log until about the time of the collision?

A. 1:43 that is the first bell after 12 o'clock midnight.

Q. And you would gather from that that the vessel ran full speed until 1:43.     A. Yes, sir.

Redirect Examination.

Q. (By Mr. ALLEN.) Now, as chief engineer

(Deposition of Anton Bergreth.)

you have charge of the engineers' work on the vessel?   A. Yes.

Q. And you had possession of this book prior to the commencement of the voyage?   A. Yes, sir.

Q. And you wrote in here the name of the vessel and the port from which the boat was sailing, and the date, and the proper heading where changes were necessary?   A. Yes, sir.

Q. And you delivered the book then to—

A. —To the first assistant engineer to take down below.

Q. His name is what?   A. Mr. Gratton.

Q. And then these entries are made at the time these bells were given from up above?

A. Yes, sir.

Q. And the engineer notes right then and there in this book [343] the time which these bells are given him and what they are?   A. Yes.

Q. And do you recognize the signature of these names or their initials that appear there?

A. Yes, I do.

Q. You know these are the signatures of your assistants?   A. Yes, I know they are.

Q. When did you see this book next after you delivered it to them, ordinarily?

A. It is brought to me at 12 o'clock noon, every day.

Q. And you say at the time of the collision you immediately went to the engine-room, after the giving of the first bell?   A. Yes.



(Deposition of Anton Bergreth.)

Q. And x143 means 43 minutes after one.

A. Yes.

Q. That means stop at 1:43.

A. Yes, that means stop.

Q. Were you in the engine-room when these bells after 1:43 were made in this book?   A. Yes.

Q. You saw them entered?   A. Yes.

Q. Immediately after the signature of L. O. Jet?

A. Yes.

Q. You saw him sign his name there?

A. I did not see him sign his name. I know this is his name.

Q. You did see him enter these bells?

A. Yes. [344]

Q. And you do know that to be his signature?

A. Yes; I know that to be his signature.

Q. I now refer to the entries in the horizontal column under the 4 A. M. watch. Now, as to the entries in the column marked total revolutions, there appears from the midnight watch 51560. You say that the entry is made at the close of the midnight watch?   A. At midnight.

Q. And the next entry would be made normally at 4 P. M.?   A. Yes.

Q. But if you had a collision as in the present case the entry would be made at the time of the collision, providing the voyage did not continue?

A. No, sir. We did not know there was a collision. This here was taken at the total running time.

Q. Now, explain to me just when the figures

(Deposition of Anton Bergreth.)

appearing in total revolutions column, 66230, were made, in point of time?

A. That was taken at 4 o'clock, at the end of the watch.

Q. (By Mr. COSGROVE.) Do you know when it was put there?

A. It is marked here 4 A. M.

Q. (By Mr. ALLEN.) Proceed.

A. I did not see him put it there but I know it was taken then.

Q. If for some reason the vessel stopped running, would you make a note of the total revolutions at the time you stopped?

A. I did not go down and take this, no.

Q. If the vessel was stopped by a collision at 1:43 and you stood by until 4 A. M., the total revolutions at 1:43 [345] 4 A. M. would be the same, would they not? Your engine would not turn over or there would be no revolutions of the engine after you stopped because of the collision, hence the total at the two different times would be the same?

A. They would not be the same.

Q. Would your engines be turning over even though your vessel was stopped? I do not know whether you understand me. This 51560, that is the number on your counter at midnight, and the 66230 is on your counter at 4 o'clock when this man goes off watch at that time and the difference shows 14670 revolutions for the 4-hour period—less the deductions for the time your engines were stopped.

(Deposition of Anton Bergreth.)

In that manner you figure the revolutions during the time she was running? A. Yes, sir.

Q. And the  $65\frac{1}{2}$  revolutions is the average for the time the vessel was in motion instead of being the average for the 4-hour total period?

A. That is the average for the time the ship was actually in motion.

Q. That represents the revolutions per minute for the time the vessel was in progress?

A. Yes. There was a deduction in time of that of 16 minutes.

Q. Now, do you know of your own knowledge whether or not  $65\frac{1}{2}$  revolutions is an accurate statement of the number of revolutions that the vessel was making at this time, an accurate average?

A. At what time do you mean?

Q. Between midnight and 1:43 A. M.

A. I would say that is fairly close to it. [346]

Q. As near as you know that is absolutely accurate? A. It would not be more.

Q. And as an engineer, basing your answer upon your experience as an engineer, would you say that was accurate? A. Yes.

Q. Now counsel asked about your test of the steering gear being a dock trial. I will ask you if there is any other sort of trial or test of the steering gear other than at the dock?

A. No, sir, that is the only trial we ever gave.

Q. Was there any difficulty experienced in any manner whatsoever with the steering apparatus, from the time you left the dock? A. No, sir.

(Deposition of Anton Bergreth.)

Q. Do you know it to have been in proper working condition between the time you left the dock and 1:43 A. M.?

A. Yes, I know it was in good condition.

Q. (By Mr. COSGROVE.) The ship left Portland about 10:55?

A. That was backing away from the dock; yes.

Q. And would that be the time for the reading of the revolutions?

A. No, sir. The revolutions are marked down at the full ahead bell.

Q. And that was marked at 12 o'clock midnight?

A. Yes, sir.

Q. When I say that I mean in addition to the 51560.

A. That was indicated on the counter.

Q. That was marked down at 12 midnight.

A. Yes, sir. [347]

Q. And the next marking that would naturally follow, would be the one at 4 o'clock? A. 4 A. M.

Q. What are the revolutions of this vessel, loaded as she was, and with the traveling water and currents, capable of making on this voyage, going full speed ahead, between Portland and the point of collision?

A. The most she could make?

Q. At full speed ahead what would she make?

A. All depend on the revolutions you want to give her; we were only turning up about 66 revolutions; we never open her full going down the

(Deposition of Anton Bergreth.)

river; they gave us full ahead but we never give her full.

Q. What will she make going full speed ahead?

A. That means she was under a full bell?

Q. I believe you said that that would be seven and a half knots?

A. Between seven and a half and eight. I don't think she would make over eight.

Q. Then in your opinion between Portland and the point of collision, running under full ahead bell, she was running about seven and a half?

A. I should say about seven and a half.

Q. (By Mr. ALLEN.) You mean after midnight? A. Yes.

Q. Prior to that time you did not have a full ahead bell?

A. No; we received that at midnight.

Q. (By Mr. COSGROVE.) Between 12 o'clock midnight and the [348] time of collision the vessel was running at about  $7\frac{1}{2}$  knots?

A. Between midnight and 1:43.

Q. Might she be going more than that?

A. I don't see how she could make it fully loaded.

Deposition closed.

Filed May 10, 1926. [349]

(Deposition of C. J. Swenson.)

AND there was duly filed in said court a deposition of C. J. Swenson, a witness on behalf of the United States, in words and figures as follows, to wit: [350]

DEPOSITION OF C. J. SWENSON, FOR THE GOVERNMENT.

C. J. SWENSON was thereupon produced as a witness in behalf of the United States of America, and, having been first duly sworn, testified as follows:

Direct Examination by Mr. SNOW.

Q. Your name is C. J. Swenson? A. Yes, sir.

Q. You are a master mariner by business and profession? A. Yes.

Q. How long have you held master's papers?

A. Since 1901.

Q. You have followed the sea, I suppose, practically all your life? A. Yes; since 1885.

Q. Now master of what vessel?

A. The "West Kader."

Q. That is a Shipping Board Vessel, is it?

A. Yes.

Q. Operated by the Columbia-Pacific Shipping Company? A. Yes. [351]

Q. You were master of the steamship "West Keats" on October 25th and 26th, 1924, were you not? A. Yes.

Q. You were master at the time of the collision

(Deposition of C. J. Swenson.)

between the "West Keats" and the "Boston Maru," were you not?     A. Yes.

Q. The collision took place not far from the St. Helens and the Columbia City range lights in the Columbia River, did it?

A. Yes, at Columbia City, just about at Columbia City.

Q. Now, describe what the "West Keats" did during the day preceding that collision, briefly.

A. I don't remember.

Q. Well, she made one or more moves in Portland harbor, didn't she, commencing in the morning?

A. I am afraid I am not fortified well enough for this here.

Q. I know it happened quite a long time ago, Captain.

A. Yes; it is over a year ago. I don't remember.

Q. You were on the vessel that day, weren't you, preceding the collision?     A. Oh, yes; sure.

Q. Were you on her all day?

A. Yes, I was on her all the time. I didn't move. I was there.

Q. What time did you start in the morning on that day?

A. We started some time around six o'clock in the morning, if my memory is right.

Q. And you were up and continually making moves?     A. Yes.

Q. And taking cargo?

A. We moved down to Terminal No. 4, from Inman-Poulsen, if I remember right. [352]

(Deposition of C. J. Swenson.)

Q. Do you remember what time you moved to Terminal No. 4?

A. Well, six o'clock in the morning.

Q. Six o'clock in the morning?

A. Yes, down to Terminal No. 4, to take in some cargo and stuff.

Q. Do you remember what time you left Terminal No. 4?

A. No, I don't remember the time. That was during the evening some time. I have forgotten that.

Q. Where did you go when you left Terminal No. 4?

A. I think I went over to the oil dock, I think. Did we or did we not? Blessed if I can remember.

Q. I would like to get that log in the Captain's hands. I think he can refresh his recollection from it.

A. I think we moved from Terminal No. 4 over to the oil dock and went to sea from the oil dock, if I ain't mistaken. That (witness indicating book) ought to be evidence enough. I will swear to that, everything that is in there.

Q. You can refresh you recollection from a copy of the smooth log of the "West Keats," which I now hand you, subject to counsel's inspection, as to the movements of the vessel.

(Mr. King here inspected said book.)

The WITNESS.—I would like to read that all right.



(Deposition of C. J. Swenson.)

Mr. KING.—Did you write it in there yourself, Captain?

A. No, I didn't write this.

Mr. KING.—Who wrote it?

A. The third officer, whoever he was. That was Mr. Hart, I think his name was.

Mr. KING.—What was his name?

A. Hart. There was Abrahamsen; he was mate, Gillette was second mate, and Hart was third mate.

Q. (By Mr. SNOW.) Hart was third mate?  
[353]

A. Hart was third mate.

Q. Hart wrote that in there, did he?

A. This is his writing.

Q. This is a copy of the smooth log, is it? I mean that is the smooth log?

A. This is the smooth log; yes. The rough log is written in pencil.

Mr. SNOW.—I am not offering that log-book in evidence; I am just asking the captain to use it to refresh his recollection.

Mr. KING.—Let him read it over and then testify after he has gotten through reading it.

Mr. SNOW.—You read it over, Captain, and then tell me briefly what time the vessel left Terminal No.4 on the evening of October 25th, if it appears that she left at that time.

The WITNESS.—(After perusing said log-book.) According to this we didn't go to no oil dock.

(Deposition of C. J. Swenson.)

Q. According to that you didn't go to the oil dock at all?

A. We went right to sea from Terminal No. 4.

Q. What time did you leave Terminal No. 4?

A. The first signal to the engine-room was 10:56, slow astern. That is backing out of the slips, see.

Q. Backing out of the slip at Terminal No. 4?

A. Yes, 10:56.

Q. And you didn't stop any place after that before the collision?     A. No.

Q. And you were headed out to sea, were you?

A. Yes.

Q. On the commencement of an oriental voyage?

A. Yes.

Q. Were you fully loaded?

A. Yes, we were fully loaded. [354]

Q. Where were you when the vessel backed out of the slip at Terminal No. 4?

A. I was on the bridge.

Q. How long did you stay on the bridge?

A. Until we entered the Columbia River.

Q. Did you have a pilot on board?     A. Yes.

Q. What was his name?

A. His name is E. A. Barry.

Q. And you left the bridge and left the vessel in charge of the pilot, did you, when you left the bridge?     A. Yes.

Q. When you entered the Columbia River?

A. Yes.

Q. And that was what time?

(Deposition of C. J. Swenson.)

A. We entered the Columbia River at 12:00 midnight.

Q. Was that midnight between October 25th and October 26th, 1924?     A. Yes.

Q. Did you change watches at midnight at that time?

A. Yes; the officers changed watches.

Q. What officer came on watch on the bridge?

A. The second officer.

Q. And what was his name?

A. His name was Gillette.

Q. G-i-l-l-e-t-t-e?

A. Yes, E. P.—I don't remember his initials; E. P. Gillette, I think, if I ain't mistaken. I would not swear to the initials.

Q. Now can you refresh your recollection further and tell me who went on watch as quartermaster or seaman at the wheel at that time? [355]

A. That was Olsen and Gidlof. Olsen was on lookout and Gidlof was at the wheel.

Q. How do you spell Olsen, O-l-s-o-n?

A. O-l-s-e-n, I think.

Q. Now a seaman by the name of Olsen, then, went on the lookout?

A. He was on the lookout from twelve to two here.

Q. From twelve to two?     A. Yes, sir.

Q. And another seaman by the name of Gidlof—

A. Yes; he was at the wheel.

Q. Went to the wheel in the wheel-house, did he?

A. Yes.

Q. Do you know where those men are now?

(Deposition of C. J. Swenson.)

A. No, I have no idea.

Q. When did you last see them or last know about them?

A. That was when we came back from the Orient on that trip.

Q. Did they sign off then?

A. They signed off then; yes.

Q. Did you ever see them after that?

A. No, I never seen them after that.

Q. Do you think you could find them now?

A. No; I don't know; I have no idea. I could not say if they were members of the Sailors' Union or not. I could not say. They may be traced there.

Q. It might be possible to trace them through the Sailors' Union? A. It may be; yes.

Q. But you don't know their addresses, then?

A. No, I haven't the slightest idea where they are.

Q. Now when you went below at twelve o'clock midnight what was the condition of the weather?  
[356]

A. It was fine weather, dark, a very dark night but clear atmosphere.

Q. Was it raining?

A. No, it was not raining.

Q. Had it been raining any during that day?

A. No; I don't recollect that.

Q. You don't think it had?

A. No. I don't remember that now.

Q. Do you remember whether it was cloudy or not? A. Yes; there was some clouds.

(Deposition of C. J. Swenson.)

Q. Was it foggy?      A. No, no fog.

Q. And by dark and clear, what do you mean with respect to the visibility?

A. Well, that you could see a long ways off; that you could see the lights that night as far as they are supposed to be seen.

Q. You had perfectly clear vision?      A. Yes.

Q. As far as lights were concerned?

A. Oh, yes; yes.

Q. You could not see the outline of a ship very far, I suppose, or the shore?

A. Oh, no; not a dark night like that.

Q. Would you say that the visibility was good or bad, then, at that time?

A. Well, the visibility was good.

Q. That was the condition, was it, from the time you left Terminal No. 4 until you went below at midnight?      A. Yes; yes.

Q. What instructions, if any, did you leave in the pilot-house [357] when you went below at midnight?

A. I told the pilot to call me if he thought my presence was necessary, and I made particular mention that if it should get foggy not to go ahead. I told him—the way I told him, “We will find a nice place to anchor, if it should get foggy.”

Q. Did the pilot understand those instructions?

A. Oh, yes; sure.

Q. What did you do when you went below?

A. Well, I laid down in my bunk and tried to go to sleep.

(Deposition of C. J. Swenson.)

Q. Did you take off your clothes?

A. No; no; ready to jump.

Q. How long had you been up that day, Captain?

A. Well, I had been up from about four o'clock in the morning.

Q. Until twelve midnight? A. Yes.

Q. Did you go to sleep or doze off in your bunk, or do you know whether you did or not?

A. Well, I must have been, because I was aroused by the telegraph—by the ringing of the engine telegraph.

Q. That telegraph rings on the bridge and in the engine-room both, does it? A. Yes; yes.

Q. Where is your room in respect to the location of the bridge?

A. Well, that is right underneath the bridge, and the wires go right through my room, right alongside of my bed, in fact.

Q. And did the moving of that wire arouse you, or the ringing of the bell on the bridge?

A. Well, it was the ringing of the telegraph.

Q. What did you do when you heard the telegraph ring? A. Well, I rushed up. [358]

Q. You what?

A. I jumped out of my bunk, and just about a minute after I heard the crash when I got up on the bridge, why, I found we had collided with this vessel.

Q. Now you heard the crash; did you also feel it?

A. No, I can't say that I felt it. No.

(Deposition of C. J. Swenson.)

Q. But you knew when you heard it that there had been a collision, I presume?

A. Oh, yes, sure; yes.

Q. And you lost no time in getting on the bridge?

A. No. I was up there, I don't suppose it took me a minute.

Q. You were immediately below it? A. Yes.

Q. When you got up on the bridge what could you see of the "Boston Maru," if anything?

A. Well, I could see—let's see. We had her—her stern was just abaft of our bridge, then, by the time I come up.

Q. Do you know how far it was away from your bridge, how far away from the ship's side?

A. I could not say how far, how many feet. I could not say.

Q. And was the "West Keats" passing on down the river? A. She was passing on; yes.

Q. How was the "Boston Maru" lying with respect to whether she was lying parallel or across the path of the "West Keats"?

A. The "Boston Maru" was lying right across the channel.

Q. Were you able to note the shore lines when you came up on the bridge?

A. No, I could not see the line there.

Q. Were there lights on the "Boston Maru"?

A. Yes, there was various lights. She had her anchor lights, [359] and she had, I particularly noticed, cluster lights, cargo lights on the main mast aft there.

(Deposition of C. J. Swenson.)

Q. On the main mast?     A. Yes.

Q. How far above the level of the deck, the level of the main deck or well deck?

A. I could not say exactly how far they are; perhaps forty feet I think; I could not say.

Q. Forty feet?     A. Perhaps that.

Q. Are you talking about the cluster lights now?

A. Yes, the cargo lights.

Q. The cargo lights?     A. Yes.

Q. Now the riding lights?     A. No; oh, no.

Q. Not the anchor light?     A. No.

Q. Captain, what did you do after you came on the bridge, and what did the "West Keats" do?

A. Well, we turned around and steamed up alongside her to find out how serious he was damaged or if he needed any—we asked him if he needed any assistance, and he said no, and we went back up to moor the ship at Terminal No. 1.

Q. What steps, if any, did you take to find out the extent of the damage of the "West Keats"?

A. Why, I sent the second mate forward to find out how serious we were damaged.

Q. Did you sound the bilges?

A. Then we sounded the bilges, and we found that the vessel wasn't [360] making any water.

Q. What was the condition of the wind at the time you went below, at the mouth of the Willamette River?

A. As near as I can remember it was light southerly wind.



(Deposition of C. J. Swenson.)

Q. Which side of the "Boston Maru" did you steam up on after the collision?

A. Which side of the "Boston Maru"? On the port side. We were on the port side of the "Boston Maru."

Q. On the port side of the "Boston Maru"?

A. Yes; she was turning (witness indicating).

Q. She was still lying across channel?

A. Yes.

Q. When you passed her then to return to Portland, which side did you go on her, the Washington or the Oregon side?

A. We was on the Washington side. We went right around her, see.

Q. But you stopped first? A. Oh, yes.

Q. And spoke to her? A. Yes, sir.

Q. When you passed her to go on up the river did you pass her bow or her stern, or pass her amidships parallel?

A. Let me see. Well, she was turned—she was tailing down the river then. We would be on her port side.

Q. Her stern was down the river by that time, was it? A. Yes.

Q. Did another vessel pass up the river or down the river during this time?

A. Well, there was two vessels passed up, but I don't know anything about that, who they were or what they were.

Q. At what speed did you continue down the river while you were [361] on the bridge, Cap-

(Deposition of C. J. Swenson.)

tain, from the time you left Terminal 4 until you came to the mouth of the Willamette?

A. We were going at half-speed.

Q. How did the vessel steer?

A. She steered fine.

Q. What was the condition of her steering engine? A. Oh, that was good.

Q. After you came to the Columbia River did you make any change in the speed of the vessel, or did the pilot?

A. Yes. We went full speed at midnight, at twelve o'clock.

Q. The engine was set full speed ahead at twelve o'clock, was it? A. Yes.

Q. At midnight? A. Yes.

Q. And that was just at the time you went below? A. Yes.

Q. Can you give an estimate of what that full speed would consist of, loaded as the vessel was and traveling through fresh water as she was on this particular voyage? A. The speed of the vessel?

Q. Yes.

A. Those ships generally make about ten miles an hour when they go full speed, and I suppose it was about the same, because it was slack tide. You see, the current would not have any effect on her.

Q. Are you speaking of nautical miles now, or land miles? A. Yes; what we call knots.

Q. Ten knots an hour? A. Yes; nautical miles.

Q. And did you log the speed of the vessel on this particular [362] voyage?

(Deposition of C. J. Swenson.)

A. No. The only way they estimate the speed, that is the pilots do, when they pass between one point and another, you see, they take the time. They know the distance from point to point and they take the time; so that they know how fast a ship is going over the ground, you see.

Q. Of course, you didn't have time to do that?

A. No.

Q. Since you went below as soon as she went into full speed? A. No.

Mr. SNOW.—That is all.

Cross-examination by Mr. KING.

Q. Captain, you say the pilots when they pass a point put down the time?

A. Oh, yes, they generally do.

Q. Where do they put that down?

A. I don't know where they do. They have a little book of their own, I believe, but I don't know if—

Q. They keep that book?

A. I don't know if they note every point.

Q. I mean from time to time they note a point?

A. Yes.

Q. Don't they make some entry on the log there, too, when they pass certain points?

A. Well, some prominent points.

Q. Are there any notations on that log when they passed certain points?

A. I don't know if he ever made any or not. There is a notation [363] of the time he left the

(Deposition of C. J. Swenson.)

dock and a notation of the time he entered the Columbia River.

Q. How far is it from the Terminal No. 4 dock that you left at 12:56, to the mouth of the Columbia River?

A. I don't remember that. I could not say exactly how many miles there is. I don't remember.

Q. Do you know approximately, Captain?

A. No.

Q. Now, Captain, don't you think that you were longer than a minute getting out of that room where you were asleep to the bridge?

A. Well, I don't know. It might have been, see. I could not say. I didn't time myself with a watch; I could not say.

Q. That is just what you think?

A. That is an estimate absolutely.

Q. But you are sure you heard the telegraph ring?

A. I heard it—well, that is what woke me up.

Q. Now, Captain, didn't the telegraph ring between the time that you went to sleep or went down to go to sleep, and the time you heard it and awakened?

A. Well, there is no record of it in the log, and if they had changed the speed of the ship, why, it would have been recorded on the log-book, and I am sure—

Q. In other words, if they want to change the speed of the ship they would have to use the telegraph to do it, wouldn't they? A. Sure; yes.

(Deposition of C. J. Swenson.)

Q. And you are accustomed to listening for the telegraph, are you not?     A. Yes.

Q. And naturally, from your long experience, your ear is trained [364] that when that telegraph rings you know that something is changing?

A. Yes.

Q. And the first time you heard it ringing is the time you have described, and you rushed up on the bridge; is that right?     A. Yes.

Q. Now, are you pretty familiar with the ranges on the river, or do you rely entirely on your pilots?

A. We rely on the pilots. I don't know them.

Q. You don't pay any attention to what they are doing as long as they are in charge?

A. Well, I pay attention.

Q. I mean, you don't pretend to lay the course for them?     A. No, no.

Q. Now, when you say that the "Boston Maru" was lying across the channel, what knowledge do you base that on? Do you mean she was cross-wise, or what?     A. She was across; yes.

Q. You mean she was across the course you were going; is that it?     A. Yes, yes.

Q. You don't mean to say, Captain, that she was clear across the entire channel, do you?

A. Well, now, she was lying crossways to our—we were coming down the river and she was lying right across our course. That is what I mean.

Q. That is what I want to make clear.

A. Yes.

Q. You naturally, having a pilot, don't under-

(Deposition of C. J. Swenson.)

take to say how wide the channel was, nor, not being in charge of the vessel, how far you were off-shore at that time? [365]

A. No; I don't know how far we were.

Q. But you do know which is the Oregon and the Washington shore along there? A. Yes.

Q. And you passed between the "Boston Maru" and the Oregon shore?

A. And the Oregon shore, yes.

Q. Now, it does not take your vessel—when she cast off her lines, say, at 10:56, it would not take her very many minutes to get under way, would it? Does your log show how many minutes it took to get her under way after the first signal to the engine-room? A. It took from 10:56 to 11:28.

Q. To get under way? A. Yes.

Q. Now, when you have the entry there at 11:28, does that mean that you were then ready to proceed down the river? A. Yes.

Q. Now, at the time that you returned to Portland, back to Terminal No. 1, after this collision, was this man Olsen, the lookout, still on board the vessel? A. Yes.

Q. And how about Gidlof, the man that was in charge of the wheel? Was he still on board?

A. Yes, he was there.

Q. Did any representative of the owners of the "West Keats" interview those men at that time?

Mr. SNOW.—That is objected to as immaterial.

A. I don't know if they were interviewed by any of the owners.

(Deposition of C. J. Swenson.)

Q. (By Mr. KING.) Now, those men remained on board and subsequently made the voyage over across the Pacific and returned, did they? [366]

A. Yes.

Q. And when you returned to Portland from that voyage they were still on board? A. Yes.

Q. Anybody ask you about them at that time?

A. Well, I don't remember exactly. You know, the men were paid off.

Q. Yes. I mean, no representative of the vessel or anyone inquired about them?

A. I don't know as they did.

Q. Nobody inquired of you about them?

A. No.

Q. When was the first time they inquired of you about their whereabouts?

A. The first time I heard of that is Mr. Snow right now.

Q. Of course, Captain, you don't know when the cargo lights of the "Boston Maru" were turned on?

A. I don't know if that was before or after the collision; no.

Q. Naturally you would not? A. No.

Q. You didn't get up on the bridge until after that? A. Yes.

Q. You are positive they were on at the time you reached the bridge?

A. Yes, I—no, not when I reached the bridge, but when we were heading—when we were steaming up I remember them distinctly. I can't swear

(Deposition of C. J. Swenson.)

as to whether if the lights were on when I came up on the bridge.

Q. That is the cargo cluster lights?

A. Yes, the cargo lights. [367]

Q. The anchor lights were burning at the time you came on the bridge? A. Yes.

Q. Now, Captain, after the collision when you went on the bridge, of course the "West Keats" continued on down the river for a period of time, didn't she? A. Well, we didn't go very far.

Q. Well, it would take quite a while to bring her to a stop, wouldn't it?

A. Not so long. Let me see.

Q. Let me refresh your recollection, Captain. The first thing that would interest you as master of that vessel was whether she was badly injured, wasn't it? A. That is the first thing.

Q. Yes; naturally that is the first thing?

A. Yes.

Q. And in order to find that out you ordered the bilges sounded, didn't you? A. Yes.

Q. Now, it took a little time to sound those, didn't it? A. Yes.

Q. And then after you discovered there was no serious damage to the "West Keats" you turned her around and came back up to see what was the matter with the "Boston Maru"?

A. No, no. The vessel was stopped and we commenced to turn her around as soon as possible after the collision—as soon as we had had the collision.



(Deposition of C. J. Swenson.)

Q. Was there ample room to turn?

A. Oh, yes.

Q. Turned easily? [368]

A. The whole river there.

Q. Now, you say you were fully loaded when you left Portland; how much were you drawing aft?

A. Twenty-five feet eight inches.

Q. How much up at the stem or bow of the vessel? A. Twenty-three eight.

Q. Twenty-three feet eight inches? A. Yes.

Q. What was it drawing at the beam?

A. I don't know. We have to figure that out.

I could not say.

Q. You have no record of that? A. No.

Q. How long was the "West Keats"?

A. She is—

Q. Approximately?

A. About four hundred twenty feet, I think, if

I remember right.

Q. What is her gross tonnage?

A. I don't remember.

Q. Was she riding clear down to her marks?

Mr. SNOW.—She is longer than that. Let me get that accurately.

Q. (By Mr. KING.) Was she riding clear down to her marks, Captain?

A. She is twenty-five feet eight.

Q. What?

A. She is twenty-five feet eight inches aft.

Q. I mean, what are her marks on her, those marks that show when she is fully loaded?

(Deposition of C. J. Swenson.)

A. I don't remember how deep she is when she is fully loaded.

Q. That varies with different vessels? [369]

A. Yes.

Q. How many vessels have you been on since, Captain?

A. That is the only one, the "Keats" and now the "Kader."

Q. Did she lose her propeller on that trip, on that voyage? A. No.

Q. Which voyage was that the "West Keats" lost her propeller?

A. We haven't lost her propeller.

Q. Didn't you lose a rudder or something?

A. No.

Q. Which one of those vessels was it lost her rudder? A. Well, when?

Mr. SNOW.—That is objected to. It is not proper cross-examination.

Mr. KING.—I may be misinformed, but I thought one of the Columbia-Pacific vessels lost her rudder or steering-gear here in the last year or so.

Q. Now, as I understand you, Captain, when you returned back up the river, which you say was promptly, the "Boston Maru" was then tailing straight up and down the stream?

A. No; she was laying in the same position. She hadn't changed her position very much. It only took us—well, it didn't take us very long.

Q. How long did it take you?

(Deposition of C. J. Swenson.)

Mr. SNOW.—Look it up in the log, Captain. I would like to know.

A. I will look it up. I will mention it—don't put it down—at 1:43 we stopped—

Q. (By Mr. KING.) What time was the collision, according to the log?

A. 1:43 stop, 1:44 our starboard bow struck the SS. "Boston [370] Maru," glancing *bow* on her counter.

Q. That is the entry? A. That is the entry.

Q. Now, when did you turn around? What does it show on that?

A. And at 4:45 full speed astern.

Q. At what, 4:45? A. 4:45.

Q. 4:45? A. Yes; that is full speed astern.

Q. That is three hours and two minutes?

A. No; 1:45; 1:45.

Q. Full speed astern? A. Full speed astern.

Q. All right. When did you get turned around?

A. We commenced to go up the river at 2:35.

Q. 2:35? A. Yes.

Q. What time did you bespeak the "Boston Maru"?

A. Well, we bespoke her between that—I don't know the time; I don't remember exactly the time we did, but that must have been somewhere just previous to that, because as soon as we found out that she was all right, why, we commenced to go.

Q. You started back to Portland at 2:35?

A. Yes.

Q. Does it show in there when you stopped?

(Deposition of C. J. Swenson.)

A. Beg pardon?

Q. Does it show in there when you stopped on your way back, passing the "Boston Maru"? You say you stopped and asked her whether she had any damage. A. Yes. [371]

Q. Does that show in your log?

A. No; there is no entry made in the log about that.

Mr. SNOW.—Pardon me. Will you read that last?

(Last two questions and answers read.)

Mr. SNOW.—That is, the time of it is not noted?

A. No.

Mr. SNOW.—Or it is not noted at all?

A. It is not noted.

Q. (By Mr. KING.) Not noted at all, is it, Captain? A. No.

Q. But you have a recollection of stopping there and asking the Japanese Captain if there was anything wrong; is that right? A. Yes.

Q. Who answered?

A. I don't know who it was.

Q. Speak English?

A. Oh, yes. I think it was the pilot.

Q. Yes.

A. In fact, the pilot, he asked, too.

Q. Well now, you say that two other vessels passed up and down about that time, is that right—either up or down?

A. Up, I think, if I am not mistaken.

Q. What?

(Deposition of C. J. Swenson.)

A. It passed up, if I am not mistaken.

Q. Two vessels passed up? A. Yes.

Q. I didn't get it right. Going back to Portland after the collision you went by the "Boston Maru" on the Washington side; is that right?

A. Yes. [372]

Q. Any you think the "Boston Maru" was still in the same position? A. Yes.

Q. As at the time of the collision?

A. As far as I can recall.

Q. I mean, as far as you can tell, she had the same position? A. Yes, sir.

Q. Now, do you know the names of those other two vessels? A. No, I don't.

Q. What kind of vessels were they?

A. I don't know. I can't say. I only saw their lights.

Q. Well, can you tell whether a vessel is a deep sea vessel by her lights? A. No, I can't say.

Q. Did they have paddles on them?

A. No. I don't know what steamers they were.

Q. Were they river boats or steamers?

A. I don't know what they were.

Q. Did they tow logs? A. I don't know.

Q. You could tell that by their lights, couldn't you, Captain?

A. Well, I think—you know, I didn't pay much attention to them.

Q. Yes. Well, naturally you would not.

A. No.

(Deposition of C. J. Swenson.)

Q. And you would not say what kind of vessels they were? A. No.

Q. And you don't have any recollection of their names? A. No.

Q. You didn't hear any whistles, did you?

A. I don't remember if I did or not. [373]

Q. Were your lookouts instructed as to what constituted anchor lights?

A. The lookout is instructed to report any light that he sees.

Q. Any light that he sees? A. Any lights.

Q. Well, were your lookouts instructed on what kind of lights constitute riding anchor lights?

A. I don't know if they were or not. They are not supposed to know—at least, the officer on the bridge, he is supposed to be the judge of that.

Q. They are instructed to report any light?

A. Yes, report any light they see, whether it is ashore or on a ship.

Q. How far away must the light be before they report it?

A. Well, report it as soon as they see it.

Q. Do they ring the telegraph when they see the light?

A. No; they report it by mouth, or some use a bell.

Q. When a pilot is on board whom does the lookout report to? A. He reports to the bridge.

Q. Well now, the bridge of course is just a structure; who is the person he reports to?

A. He reports; he just reports.

(Deposition of C. J. Swenson.)

Q. I am not a seaman, Captain; I don't know. You have an officer in charge?

A. We have an officer and a pilot on the bridge.

Q. Now, whom does the lookout report to?

A. Well, that is a funny question. They are both there.

Q. Well, you mean he just simply reports and he does not say it to anybody, but just simply—what does he yell? A. Yes, that is all. [374]

Q. What does he yell, "Light aft" or "Port," "Bow," or "Starboard," or something like that?

A. Yes; wherever he sees it.

Q. Yes; he indicates the direction? A. Yes.

Q. Now, when that report comes to the bridge what do they do? A. Well, they answer.

Q. Well, after they have done that what do they do?

A. Well, that all depends on the circumstances.

Q. Don't they make any record of it? A. No.

Q. No record made? A. No.

Q. You mean to say when they cross courses no record is made, or when they see lights, or anything?

A. Well, we would have an awful lot of records if we marked down every light or everything we pass on our way.

Q. What did the pilot say to you after you came on the bridge?

A. I don't remember exactly what passed.

Q. Well, just give me an idea of what was said as well as you can remember.

(Deposition of C. J. Swenson.)

A. The first thing I asked him if he had—I said, Did he have a collision? So he says, “I am afraid we did.”

Q. Well, what was said next?

A. I don't remember all the conversation.

Q. Of course you could not remember the exact words, but what did he say to you as well as you can remember?

A. Well, I would not undertake to repeat, because I don't remember exactly what it was. But we talked about various things.

Q. What were some of the things he talked about? [375]

Mr. SNOW.—Give him your best recollection, Captain, if there is anything more.

A. Well, I don't know exactly what he wants.

Q. (By Mr. KING.) You don't remember it; is that right?

A. One thing he called my attention to was on the range, some range, but I don't know what range it was.

Q. Well now, you were pretty busy. Who gave the order to sound the bilges? A. I did.

Q. Who gave the orders directing the vessel to turn around?

A. Well, the pilot; he did. That is, he did the turning around; he directed the movement of the ship.

Mr. KING.—Well, I think that is about all the questions I want to ask you, Captain.

The WITNESS.—This is a long time ago.



(Deposition of C. J. Swenson.)

Q. (By Mr. KING.) You haven't had any collisions since then, have you, Captain?

A. No, I haven't.

Q. He says that he can't remember, but this collision would make a pretty firm impression in your mind, wouldn't it, Captain? It is the only collision you ever had, isn't it? A. Yes.

Redirect Examination by Mr. SNOW.

Q. Captain, let me ask you about this matter Mr. King was just talking to you about, the conversation with the pilot. Let me remind you, when he said something about the ranges that you didn't understand, did he add something about the position of the "Boston Maru" and where she was anchored? [376]

Mr. KING.—I object to that as leading.

Mr. SNOW.—Let's see. I don't want to lead him. I guess I have already done it, though.

Q. Did he add anything else about the "Boston Maru"?

Mr. KING.—Well, I object to that as hearsay.

A. Well, that is not hearsay, because it is the fact.

Mr. SNOW.—We will let the Court take it for what it is worth, then.

Q. If he did say anything else about the "Boston Maru" tell it now, Captain.

Mr. KING.—The same objection.

A. Well, he says, "Look at the range." He says, "She is right on the range." That is the words he said. Now, what range that range that was, I don't know.

(Deposition of C. J. Swenson.)

Q. (By Mr. SNOW.) When he said "she," what did he mean?

A. Well, the "Boston Maru." We also refer to a vessel as female.

Q. But you don't know what range he meant?

A. No, I don't know.

Q. Because you are not familiar enough with the ranges in the river down there? A. No.

Q. Captain, you looked into the log there in checking on those times and gave it as your understanding that the collision occurred at 1:44. You check these times and see if they are right now: 1:44 A. M. A. 1:44, yes.

Q. 1:44 A. M.? A. Yes.

Q. And then you thought that the "West Keats" had turned around and started up the river just after 2:35 A. M.; is that correct? [377]

A. Yes, at 2:35.

Q. So that would be a period of sixteen minutes plus thirty-five minutes, or fifty-one minutes; is that correct?

A. Four from five is one—fifty-one minutes.

Q. Fifty-one minutes. It took you approximately that long to get turned around?

A. Yes. And prior to this time we were—let's see. Yes, at 2:03—is this to go in as evidence?

Q. Yes.

A. At 2:03 he stopped and then it says, 2:16 we went slow ahead and 2:20 half ahead.

Q. What was he doing; turning around then?

(Deposition of C. J. Swenson.)

A. No. We were going—evidently here at 2:03 we stopped alongside the “Boston Maru,” see. It didn’t take us all of this time to turn around, you see.

Mr. KING.—You have to stop and go ahead?

A. We would have to go ahead. Now here is 1:56 full astern and 1:58 full ahead. Now, according to the bearings, or, rather, the signals, why, we were turned around by that time. You see, that would only be about fourteen minutes. That is about what it takes.

Q. (By Mr. SNOW.) You are just figuring now about the length of time it would take, are you, Captain? A. Yes.

Q. You don’t remember exactly what it did take on that occasion? A. No; no.

Q. Captain, does a vessel like the “West Keats,” loaded as the “West Keats” was at that time, steer better when she is going half ahead or full ahead?

A. No; the more speed the better they steer.

And further deponent saith not.

Signature waived.

Filed July 2, 1926. [378]

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AND there was duly filed in said court, a deposition of E. P. Gillette, a witness on behalf of the United States, in words and figures as follows, to wit: [379]

DEPOSITION OF E. P. GILLETTE, FOR  
THE GOVERNMENT.

Said E. P. GILLETTE was thereupon sworn to tell the truth, the whole truth and nothing but the truth, and testified as follows:

Direct Examination by Mr. SNOW.

Q. Your name is E. P. Gillette?     A. Yes, sir.

Q. What is your occupation, Mr. Gillette?

A. Seaman.

Q. What papers do you carry?

A. Chief mate, ocean steam vessels.

Q. Any ocean, any tonnage?

A. Any ocean, any tonnage.

Q. How long have you been at sea?

A. Nine years.

Q. How long have you been an officer?

A. Since 1921.

Q. By whom are you now employed?

A. Columbia Pacific Shipping Company.

Q. That company operates United States Shipping Board vessels, does it?     A. They do.

Q. About how many of them?

A. I believe they have about ten now, or twelve; I am not certain. [380]

Q. The number varies at different times, does it?

A. Yes, sir.

Q. According to the amount of business?

A. According to the business it varies.

Q. They also own, or operate other vessels than the Shipping Board vessels, don't they?

(Deposition of E. P. Gillette.)

A. They do.

Q. Which vessel are you on now?

A. The S. S. "Myrtle."

Q. Is that operated by them?

A. That is owned by them and operated.

Q. In what capacity are you on it?

A. Second officer.

Q. What kind of vessels, that is, briefly what kind of vessels are the Shipping Board vessels that the Columbia Pacific has operated?

A. Cargo steam vessels.

Q. Of approximately what deadweight tonnage?

A. Around eighty-eight hundred; some more and some less.

Q. Have you been employed on vessels of that character?     A. I have.

Q. All the time you have been with the Columbia Pacific?     A. Yes, sir.

Q. And during what time have you been with them?     A. Since 1921.

Q. Have you always been on the same ship, or have you been on different ships?

A. I have been on two different ships with this company.

Q. What are those two ships?

A. The "West Keats" and the "Myrtle" or the "Jena," previously [381] the "Jena."

Q. The "Myrtle" is the ship you are now on?

A. Yes, sir.

Q. And she was previously known as the "Jena"?

A. As the "West Jena."

(Deposition of E. P. Gillette.)

Q. As the "West Jena"? A. Yes, sir.

Q. The Columbia Pacific bought her from the Shipping Board, did they? A. Yes, sir.

Q. How long were you on the "West Keats"?

A. From January, 1921, to May, 1924.

Q. No—May, 1924? A. Yes, sir—1925, rather.

Q. May, 1925. In what capacity were you on her?

A. First as third officer, and then as second officer.

Q. When did you become second officer of the "West Keats"? A. In January, 1922.

Q. In January, 1922? A. Yes, sir.

Q. You were on her then as second officer October 25th and October 26th, 1924? A. I was.

Q. You were on her at the time of the collision with the "Boston Maru"? A. I was.

Q. That collision occurred at ship's time approximately 1:44 October 26th, 1924? A. It did.

Q. According to your recollection?

A. Yes, sir. [382]

Q. Please describe the course of the vessel briefly from the previous evening, the evening previous to the collision. From what terminal or port did she depart?

A. Left Terminal No. 4 on the evening of the 25th.

Q. That is the Municipal Terminal of the Port of Portland No. 4?

A. Municipal Terminal No. 4.

(Deposition of E. P. Gillette.)

Q. Do you remember approximately what time you left there?

A. I believe it was around ten-thirty.

Q. And proceeded where?     A. Down river.

Q. When did you come on watch?

A. At twelve o'clock.

Q. Midnight?     A. Midnight.

Q. Where was the vessel then?

A. It was just entering the Columbia River.

Q. Were you on watch from then on until the collision?     A. I was.

Q. And thereafter?     A. Yes, sir.

Q. During that period who wrote up the rough log of the vessel?     A. I did.

Q. That was your regular duty, was it?

A. Yes, sir.

Q. While you were on watch?     A. Yes, sir.

Q. And who made the entries from the rough log into the smooth log?

A. The third officer, J. P. Hart.

Q. The entries in the rough log as of the time of the collision [383] then would be in your handwriting, would they?     A. They would.

Q. When you went on watch twelve midnight as the "Keats" was coming into the Columbia River, where did you take your position?

A. From the light at the entrance of the Columbia River, or the entrance to the Willamette River.

Q. Did you note that light in relation to the "West Keats" at the time?

(Deposition of E. P. Gillette.)

A. Yes, sir; I noted it in the log-book, entering the Columbia River at twelve o'clock.

Q. And from what part of the "West Keats" did you note that? A. In the pilot-house.

Q. What kind of a night was it as to weather conditions?

A. The sky was dark and overcast, but the visibility was very good.

Q. Was it what you would call a dark or a gray night, or how would you describe the night?

A. A black night, with good visibility, the lower atmosphere clear.

Q. The lower atmosphere clear, did you say?

A. Yes, sir.

Q. Was there any fog? A. No, sir.

Q. What rain, if any? A. No rain.

Q. How much wind, and from what quarter?

A. I believe the wind was westerly, I am not certain now, and about force two.

Q. Was the wind variable or fixed?

A. I don't remember. The force of the wind is entered in the log; it was taken at the time; and the direction.

Q. You took it and entered it in the log-book, did you? [384] A. Yes, sir.

Q. At what kind of a bell did the "West Keats" operate from the time you went on bridge?

A. Full speed ahead.

Q. When was she put at full speed ahead?

A. Entering the Columbia River.

Q. And how long did she maintain that speed?



(Deposition of E. P. Gillette.)

A. Up till one minute before she struck the "Boston Maru."

Q. What was done with her engines one minute before she struck the "Boston Maru"?

A. They were stopped.

Q. Were they put astern at any time before the collision? A. No, sir.

Q. When were they put astern first after the collision? A. One minute after the collision.

Q. Did you take those times? A. I did.

Q. When you say the engines were stopped one minute before the collision do you mean exactly sixty seconds, or did you mean that in a more approximate way?

A. I mean sixty-seconds as taken from the pilot-house clock.

Q. Did you enter those times in the log-book?

A. I did.

Q. Have you figured the speed of the "Boston Maru," the average speed of the "Boston Maru," from the time she entered the Columbia River until the collision?

A. You mean the speed of the "West Keats"?

Q. I beg your pardon; the speed of the "West Keats"?

A. Eight and eighty-four hundredths miles an hour.

Q. You figured that yourself? [385]

A. I did.

Q. How did you figure it?

(Deposition of E. P. Gillette.)

A. I took the distance from the entrance of the Columbia River to the position of the "Boston Maru," as they showed it by their cross-bearings.

Q. As shown by the cross-bearings taken on board the "Boston Maru," you mean? A. Yes, sir.

Q. You took that distance? A. Yes, sir.

Q. How did you find that distance?

A. I took it from the scale on the United States Coast and Geodetic Survey, measured the main ship channel.

Q. That channel is marked on the United States Coast and Geodetic Survey charts, is it?

A. The ranges are.

Q. You are familiar with it?

A. And we followed the ranges down. Yes, sir, I am familiar with it.

Q. How many miles did that show from the mouth of the Columbia River to the place of the collision?

A. Fifteen and three-tenths miles.

Q. And how much time was consumed between those two points?

A. An hour and forty-four minutes.

Q. And the speed of the "West Keats" figured how much?

A. About fifteen and three-tenths miles, divided by the time interval, an hour and forty-four minutes.

Q. And what did you say that speed was?

A. 8.84.

Q. 8.84 miles per hour? [386]

A. Nautical miles; yes, sir.

(Deposition of E. P. Gillette.)

Q. All of this is nautical miles, is it, or land miles? A. Nautical miles.

Q. You didn't use land miles in your calculations at all?

A. No, sir. We never use land miles in navigation.

Q. Did you figure that up to the instant of the collision, or up to the time the engines of the "Keats" were stopped for the collision?

A. Up to the instant of the collision.

Q. So that time included the last minute when her engines were stopped? A. Yes, sir.

Q. State whether or not there was a lookout on the vessel at and before the time of the collision.

A. There was.

Q. When did he go on watch?

A. He went on watch at twelve o'clock.

Q. The same time you did? A. Yes, sir.

Q. Where did he take his position?

A. On the forecastle-head.

Q. Do you know what his name is?

A. Olsen. It is entered in the log-book, the lookout.

Q. You may use a photostatic copy of the smooth log of the "West Keats" to refresh your recollection, if you wish. His name is Olsen?

A. Yes, sir.

Q. Where did he take his position on the "West Keats"? A. On the forecastle-head.

Q. How do you know he was there? [387]

A. He reported lights—not lights but time going

(Deposition of E. P. Gillette.)

down the river, striking the bells at twelve-thirty and one o'clock.

Q. You heard his reports at various times, did you?   A. Yes, sir.

Q. And his bells?   A. Yes, sir.

Q. What became of that man? Did he make that voyage with you?   A. Yes, sir.

Q. To the Orient and back?   A. Yes, sir.

Q. What did he do then? Did he stay on the ship or leave it?

A. No, sir; he left the ship when we got back.

Q. Have you seen him since?   A. No, sir.

Q. Do you know where he is?   A. No, sir.

Q. You have no idea how he could be found now?

A. No, sir.

Q. Was there a man at the wheel during the period between the time you went on watch and the collision?   A. There was.

Q. What was his name?   A. Gidlof.

Q. Gidlof?

Mr. McCAMANT.—I don't object to Mr. Gillette looking at the log for matters of this kind, but I doubt very much if he is entitled to refresh his memory with the smooth log, which was not his own memorandum. I think he would be entitled to look at the rough log.

Q. (By Mr. SNOW.) Now, as to Gidlof, did he make that voyage with [388] you, too?

A. Yes, sir, he did.

Q. The same one that Olsen made?

A. Yes, sir.

(Deposition of E. P. Gillette.)

Q. Did he stay on the ship or leave it?

A. He left the ship on her return to Portland.

Q. And do you know where he is?     A. No, sir.

Q. And you don't know any more about him than you do about Olsen?     A. No, sir.

Q. State the manner in which Gidlof handled the ship and obeyed orders of the pilot during that period from the time he went on watch.

A. He obeyed the orders promptly and correctly.

Q. What kind of a helmsman was he?

A. He was a good helmsman.

Q. Did you have or assume any duties in respect to the obedience by the helmsman of the pilot's orders?

A. When the pilot would give the orders I would look to see that they were properly executed.

Q. State the manner in which the "Boston Maru" answered her helm between the time you went on watch and the time of the collision.

A. The "West Keats"?

Q. The "West Keats." I beg your pardon.

A. She answered her helm promptly—no trouble whatever in steering.

Q. Her steering gear appeared to be in good or bad condition?

A. In good condition.

Q. During the time between the time you went on watch and the time of the collision did you stand any one place? If so, where? [389]

A. I stood inside the pilot-house beside the telegraph.

(Deposition of E. P. Gillette.)

Q. All the time?     A. Yes, sir.

Q. Did you give the order by which the vessel was put full speed ahead on the telegraph?     A. I did.

Q. At whose direction did you do that?

A. The pilot's orders.

Q. When the pilot directed an order to the engine-room, then who gave that order on the telegraph?

A. I did.

Q. If he directed an order to the helm who obeyed that order?

A. He gave his orders direct to the helmsman and then I would look to see that they were properly executed.

Q. You didn't repeat them?     A. No, sir.

Q. You just looked to see that he understood and obeyed them?     A. Yes, sir.

Q. Who was the pilot? Do you remember his name?     A. Captain Barry.

Q. Where did he stand? I am speaking about the same period of time now between twelve o'clock and the time of the collision.

A. He stood outside the pilot-house on the bridge. He would walk back and forth across the bridge, sometimes on one side and sometimes the other.

Q. About how long before the collision did you first sight the "Boston Maru's" lights?

A. About four minutes.

Q. Now, when you speak of sighting the "Boston Maru's" lights at four minutes, do you mean that is the first glimpse you got of the [390] lights, or

(Deposition of E. P. Gillette.)

the first time you made them to be the lights of a vessel?

A. The first time I knew they were the lights of a vessel.

Q. Were there other lights in the vicinity?

A. Yes, sir.

Q. How many?

A. There were quite a few. I could not say just how many.

Q. What were those lights?

A. Those range lights, and then there were shore lights—buildings on the land.

Q. Was there anything particularly to distinguish the "Boston Maru" lights from the shore lights and other lights in the neighborhood?

A. Not until I got close enough to make them out. They all look alike at a distance.

Q. When did you first see that group of lights, of which the "Boston Maru's" lights were a part?

A. When we come on to the St. Helens range.

Q. How long was that before you made out the "Boston Maru" lights as the lights of the vessel?

A. I could not say just how long before; possibly five minutes, four or five monutes.

Q. Could you tell by looking at the lights of the "Boston Maru" whether she was lying up and down channel, or across the channel, or how she was lying?

A. She was lying across the channel.

Q. How could you tell that?

A. By the position of her lights.

(Deposition of E. P. Gillette.)

Q. Was her stern or her bow toward the Oregon shore?

A. Her stern was towards the Oregon shore.  
[391]

Q. Her stern anchor light is higher or lower than the bow light, is it?     A. It is lower.

Q. Could you tell whether she was directly across the channel, or in some diagonal position?

A. I could not tell that she was exactly across, but I could tell that she was very close, if not directly across.

Q. When you first made those lights could you see anything of the hull of the vessel?     A. No, sir.

Q. Did you ever see anything of the hull of the vessel?

A. Not until we was right alongside of her, struck, I could make out the dim outline of the hull.

Q. State whether or not the lookout reported the "Boston Maru."     A. I believe he did.

Q. At what time would you say that he reported it?

A. About three or four minutes before the collision.

Q. About the time you made her out?

A. Yes, sir.

Q. Had you been looking at her lights before that along with the other lights?     A. Yes, sir.

Q. Did you have any expectation of finding a vessel anchored there at that point, or did you give much thought to the finding of a vessel anchored



(Deposition of E. P. Gillette.)

there before you actually saw her lights and made them out?

A. I didn't expect to see a vessel anchored there in the main ship channel.

Q. Did you know she was in the main ship channel when you first made her out? [392]

A. No, sir.

Q. Did you know there was an anchorage ground in that general vicinity? A. No, sir.

Q. Do you know now whether there is an anchorage ground in that general vicinity?

Mr. McCAMANT.—I object to that as irrelevant and immaterial.

A. I do. There is an anchorage ground there.

Q. (By Mr. SNOW.) In that vicinity?

A. Yes, sir.

Q. Do you know when the pilot first made out the "Boston Maru" as an anchored vessel?

A. No, sir.

Q. Did you report to him? A. No, sir.

Q. Did he know before you? Could you tell by his actions, or what he said?

A. I could tell by his actions that he knew there was a ship there.

Q. When you first made out the lights of the "Boston Maru" as lights of an anchored vessel, state whether or not you knew approximately how far her stern was from the Oregon bank.

A. I could not tell; it was too dark. I could not make out the shore line.

Q. On what range, if any, was the "West Keats"?

(Deposition of E. P. Gillette.)

moving at the time you made out the lights of the "Boston Maru"?

A. Coming down the St. Helens range.

Q. Somewhere near the center of that range?

A. Yes, sir.

Q. Could you see the range lights?

A. Yes, sir.

Q. Could you yourself tell that you were on the range? [393] A. Yes, sir.

Q. You knew the range lights from the other lights in the vicinity, did you? A. Yes, sir.

Q. After sighting the "Boston Maru" did the "West Keats" — after you sighted the "Boston Maru" did the "West Keats" still keep on the range?

A. She kept on the range until she got down to the end of the range and then swung off.

Q. Pursuant to what order and whose order did she swing off the range? A. The pilot's orders.

Q. What was that order? A. Port a bit.

Mr. McCAMANT.—What was that?

A. Port a bit.

Q. (By Mr. SNOW.) Was that order obeyed by the helmsman? A. It was.

Q. Did you see it? A. I did.

Q. Did the vessel answer her helm?

A. Yes, sir.

Q. Did she swing a little to starboard?

A. Yes, sir.

Q. What was the next order the pilot gave, if any? A. Steady.

(Deposition of E. P. Gillette.)

Q. Was that order obeyed?     A. It was.

Q. Did the vessel steady?     A. Yes, sir. [394]

Q. She was then off the range, was she?

A. Yes, sir.

Q. Now, were the next range lights below the St. Helens range, or where were they at the time of this collision?

A. The next range was the Columbia City range, and we were leaving the St. Helens range coming on to the Columbia City range at the time.

Q. There was a space between the two ranges, was there?

A. There was a space where you have to turn off before you get on the other range.

Q. Follow down the bank there?     A. Yes, sir.

Q. What bank?     A. The Oregon shore.

Q. Is that the ordinary channel?     A. Yes, sir.

Mr. McCAMANT.—I object to that and move to strike out the answer of the witness on the ground that he has not shown himself qualified to answer that question. His testimony is, therefore, incompetent and irrelevant.

Q. (By Mr. SNOW.) These Columbia Pacific vessels in which you have served for a number of years, what routes have they been on?

A. Oriental trade.

Q. Out of what port in the United States?

A. Portland.

Q. And the vessel you are now on is on what trade?     A. Intercoastal.

Q. Out of what port?     A. Out of Portland.

(Deposition of E. P. Gillette.)

Q. Out of Portland? [395] A. Yes, sir.

Q. You have been up and down the Columbia River a number of times, have you, on these vessels?

A. Yes, sir.

Q. Have you examined the charts, the Coast and Geodetic charts of the river? A. Yes, sir.

Q. You would not claim to be a competent Columbia River pilot, would you? A. No, sir.

Q. If you claim any degree of familiarity with the Columbia River channel from going up and down that river and from examining its charts, state in a general way what you think you know about it.

A. Well, I know most of the places along the river, and the ranges.

Q. Do you know the course of the channel as it moves from one side of the river to the other?

A. I know the general course of it.

Q. Now, you testified that the pilot ordered port a little and then as the vessel swung to starboard and off the St. Helens range he ordered steady, and then the vessel steadied? A. Yes, sir.

Q. And that both of those orders were obeyed?

A. Yes, sir.

Q. Now, did you see the lights of the "Boston Maru" at that time?

A. After we had swung off the St. Helens range I could see them.

Q. And could you see the bulk of the hull of the vessel at that time? A. No, sir.

Q. Could you see other shore lights?

(Deposition of E. P. Gillette.)

A. Yes, sir. [396]

Q. What was the appearance of the river in front of you as to whether it appeared that there was room for the "West Keats" to pass between the stern of the "Boston Maru" and the Oregon shore?

A. There appeared to be room to pass.

Q. Of course you are not entirely familiar with the depth of the water in the various places there?

A. No, sir.

Q. Where did the pilot appear to be running; between the "Boston Maru" and the Oregon shore, or between the "Boston Maru" and the Washington shore?

A. Between the "Boston Maru" and the Oregon shore.

Q. Now, what was the next order the pilot gave, if any? A. To starboard a bit.

Q. Was that order obeyed? A. Yes, sir.

Q. From your observation what was the purpose of that order?

A. To clear the "Boston Maru," which was just about—her stern light was just about right ahead of us at that time.

Q. You were heading pretty much toward her stern then? A. Yes, sir.

Q. And that was to throw you a little closer to the Oregon shore? A. Yes, sir.

Q. So that you would clear her? A. Yes, sir.

Q. Did the vessel obey that order?

A. No, sir.

Q. Did the helmsman obey the order?

(Deposition of E. P. Gillette.)

A. He did.

Q. Now, what was the next order, if any, that the pilot gave?   A. Hard astarboard. [397]

Q. What was the purpose of that order, in your judgment?

A. He seen that the ship's helm, or the ship's head wasn't coming to port, so he ordered the helm hard astarboard to bring her over to port and clear the stern of the "Boston Maru."

Q. Did the helmsman obey that order?

A. He did.

Q. Did he put the helm hard over?

A. He did.

Q. Did the ship obey her helm?   A. No, sir.

Q. Which way did it go?

A. Kept right going straight ahead.

Q. What was the next order, if any, that the pilot gave?   A. Stop.

Q. Who was that order given to?   A. To me.

Q. Did you obey it?

A. I transmitted it on the engine-room telegraph and it was obeyed below.

Q. You received the usual answer on the telegraph, did you?   A. Yes, sir.

Q. Were the engines stopped?   A. They were.

Q. Promptly?   A. Yes, sir.

Q. You could tell that, could you?

A. Yes, sir; by the indicator in the pilot-house.

Q. Did you take the time of that order?

A. Yes, sir.

Q. What was the time of that order? [398]

(Deposition of E. P. Gillette.)

A. One forty-three A. M.

Q. One forty-three A. M., October 26th, 1924?

A. Yes, sir.

Q. What was the course and direction of the "West Keats" from that time until the time of the collision?

A. She kept the same course and direction.

Q. Straight ahead? A. Yes, sir.

Q. And when was the impact of the collision?

A. At 1:44 A. M.

Q. The starboard bow of the "West Keats" hit the starboard quarter or stern of the "Boston Maru"; is that correct? A. Yes, sir.

Q. As will be shown by photographs in evidence?

A. Yes, sir.

Q. And that collision occurred at what time?

A. One forty-four A. M.

Q. You took the time of that? A. I did.

Q. You entered the time of the stop order and of the collision in the log-book, did you?

A. Yes, sir.

Q. In the rough log? A. Yes, sir.

Q. Did you enter them correctly? A. Yes, sir.

Q. What was the next order given by the pilot after the collision? A. Full astern.

Q. What time was that?

A. One forty-five A. M. [399]

Q. Did you transmit that order to the engine-room? A. I did.

Q. Was it obeyed? A. It was.

Q. Promptly? A. Yes, sir.

(Deposition of E. P. Gillette.)

Q. Did you enter the time of it in the log-book?

A. I did.

Q. You testified a moment ago that the pilot gave a hard astarboard order? A. Yes, sir.

Q. And that that was obeyed, and that thereafter he gave a stop order? A. Yes, sir.

Q. Did you take the times of those orders that he gave to the helmsman? A. No, sir.

Q. You didn't enter those in the log-book?

A. No, sir.

Q. It is not customary? A. No, sir.

Q. Can you estimate or guess at the length of time elapsing between the stop order and the previous hard astarboard order?

A. It was possibly a minute or two.

Q. A minute or two?

A. Yes, sir, as I recollect.

Q. Now, that is your recollection? A. Yes, sir.

Q. And it is an estimate, is it?

A. Yes, sir. [400]

Q. Can you estimate the length of time elapsing between the hard astarboard order, of which you have just been testifying and the previous starboard a bit order?

A. Possibly half a minute or a minute.

Q. That is an estimate again? A. Yes, sir.

Q. What was the position of the helm of the vessel at the time of the collision?

A. Hard astarboard.

Q. Had it remained hard astarboard from the time of that hard astarboard order? A. Yes, sir.



(Deposition of E. P. Gillette.)

Q. And when was it changed from that position of hard astarboard?

A. I could not say. It wasn't before 1:45 until after the collision.

Q. It wasn't until after that full speed astern order? A. No, sir.

Q. Now, after that full speed astern order at 1:45, without going into details as to just what was done with the helm of the "West Keats" and just what was done with the engine of the "West Keats," state what the "West Keats" did under the pilot's orders, or if she did it under the pilot's orders.

A. Well, I could not say what the pilot's orders were, because at 1:45 the captain come up on the bridge and sent me forward to see what damage had been done. I wasn't on the bridge until after she had turned around and come up the river again—started up the river.

Q. I see; you went forward to the forecastle-head, did you? A. Yes, sir.

Q. And underneath? [401]

A. No, sir; on top; on top of the forecastle-head.

Q. Looked over the side?

A. Yes, sir; and stood by the anchor.

Q. You ascertained the damage of the "West Keats," did you? A. Yes, sir.

Q. In a general way? A. Yes, sir.

Q. Did you sound the bilges?

A. No, sir. They were sounded, though, by the quartermaster.

(Deposition of E. P. Gillette.)

Q. While you were there of course you could tell what the "West Keats" was doing, couldn't you?

A. Yes, sir.

Q. What was she doing?

A. Went down the river, turned around, come up and stood by the "Boston Maru."

Q. Did somebody on the bridge of the "West Keats" speak to the "Boston Maru"?

A. Yes, sir.

Q. Ask them anything about the damage?

A. Yes, sir.

Q. Did you hear what was said?

A. Asked what damage had been done and if they needed any assistance.

Q. What did they answer?

A. No, they didn't need any assistance.

Q. Then the "West Keats" proceeded up the river? A. Yes, sir.

Q. Going up the river which side of the "Boston Maru" did she pass on, the Washington or Oregon side?

A. Passed on the Washington side. [402]

Q. In turning below the "Boston Maru" to proceed upstream, which way did she turn to, the starboard or the port? Which way did the bow turn to? A. Turned to starboard.

Q. Was the "West Keats" loaded or empty at the time of this occurrence? A. Fully loaded.

Q. Down to her marks? A. Yes, sir.

Q. Does the "West Keats" steer better when

(Deposition of E. P. Gillette.)

loaded in that way with her engine going full ahead or half ahead, or in some other way?

A. Well, it does not make much difference how she is loaded, but she steers better when she is going full ahead than any other way.

Q. What is the reason for that?

A. We have more action on the rudder, the wash of the wheel against the rudder.

Q. By the wheel you mean the propeller?

A. Yes, sir.

Q. The propeller throws water out to the stern, does it? A. Yes, sir.

Q. Past the rudder? A. Yes, sir.

Q. The propeller is forward of the rudder, it is?

A. Yes, sir.

Q. Will the "Keats" steer better with her engine going full ahead than stopped? A. Yes, sir.

Q. With her engines going full astern how does she back? What effect does that have on her steering?

A. It brings her bow to port and her—brings her bow to starboard [403] and her stern to—

Q. Her stern to port?

A. To port, yes, sir.

Q. Backs to port, in other words?

A. Yes, sir.

Q. Suppose the "West Keats," loaded as she was, traveling a speed of 8.84 nautical miles per hour, and the engines are stopped without being turned astern, about how long in minutes would it take her to come to a stop, or substantially stop?

(Deposition of E. P. Gillette.)

A. I would estimate around thirty minutes.

Q. How many miles would she cover in that time?

A. About four miles, three to four miles.

Q. Now, suppose her engines are operated full speed astern, how long would it take her to come to a stop?

A. About fifteen minutes, ten to fifteen.

Q. In a river the size of the Columbia could they keep the engine full speed steadily, or would they have to stop it occasionally and kick it around with the helm to keep her in the river?

A. Yes, sir, to keep her from running ashore they would have to do that.

Q. When did you first realize there was going to be a collision?

A. When I seen that the vessel's head would not answer the starboard helm, possibly slightly over a minute before she struck.

Q. Could the "West Keats" have been turned then to pass on the Washington side of the "Boston Maru"? A. No, sir.

Q. What would have happened if she had attempted that maneuver?

A. It would probably have hit the "Boston Maru" amidships and cut her in two. [404]

Q. At that time which you are speaking of could you tell how far the "Boston Maru" was from the Oregon shore? A. No, sir.

Q. Did she still look as if there was room to pass between?

(Deposition of E. P. Gillette.)

A. There appeared to be room to pass between.

Q. In order for the "West Keats" to have turned and passed on the Washington side it must have commenced that turn sometime before that?

A. Yes, sir.

Q. Can you make a guess as to how far before it would necessarily be?

A. Probably five minutes before.

Q. About the time you first sighted the "Boston Maru"? A. Yes, sir.

Q. Or a little before that?

A. About the time I sighted the "Boston Maru" she could make the turn then.

Q. That is about the time you first made her out to be a vessel then? A. Yes, sir.

Q. She could have turned then to pass on the Washington side? A. Yes, sir.

Q. Could she have safely turned any time after that time? A. No, sir.

Mr. SNOW.—That is all.

Cross-examination by Mr. McCAMANT.

Q. What are the dimensions of the "West Keats," Mr. Gillette?

A. I think it is about four hundred, right around four hundred [405] twenty feet, ten feet more or less.

Q. And what is her beam?

A. I think it was fifty-two feet.

Q. Had her steering gear been inspected here in Portland harbor? A. Yes, sir.

Q. Who did the inspecting? A. Third officer.

(Deposition of E. P. Gillette.)

Q. You personally did not inspect it?

A. No, sir.

Q. You know nothing about it except what the third officer told you?

A. I know that she was steering properly going down the river.

Q. And yet she did not answer her helm the last two times that orders were given before the collision.

A. No, sir.

Q. Up to that time you say she had answered her helm properly?      A. Yes, sir.

Q. Now you say that you think that the lookout reported the "Boston Maru"?      A. Yes, sir.

Q. Are you sure of that one way or the other?

A. I am not sure of it.

Q. You also say that when you made out that the lights ahead were those of a vessel, you saw that the pilot realized that it was a vessel ahead?

A. Yes, sir.

Q. What makes you think that the pilot knew there was a vessel ahead?

A. He gave the order starboard a bit, in order to go astern of her. [406]

Q. You didn't make out the "Boston Maru" to be a vessel—the lights of the "Boston Maru" to be those of a vessel, until you heard the pilot's order, starboard a bit; is that right?

A. It was slightly before that I knew that it was a ship at anchor there.

Q. The "Boston Maru" had her anchor lights burning, had she not?      A. Yes, sir.

(Deposition of E. P. Gillette.)

Q. And you could see those lights how far?

A. Well, you could see them when you come on to the St. Helens,—coming down the St. Helens range; but at that time I didn't know they were the lights of a vessel. I could not tell the difference between her lights and the lights ashore.

Q. Well, there were two lights near together, one of them high up and the other one lower down, weren't there?

A. They are not near together. One is at the bow of the ship and one is at the stern.

Q. Well, at distance of say six miles the two lights would be near together, wouldn't they?

A. Yes, sir; they would appear close together at that distance.

Q. Yes; and at that distance one of the lights was high up and the other one was lower down, wasn't it?

A. Yes, sir. However, you could not see her six miles off, because of that turn in the river.

Q. You are sure of that are you? A. Yes, sir.

Q. How far off do you say that you could see the lights of the "Boston Maru"?

A. Well, you could see them when you come on, coming down the St. Helens range.

Q. How far do you say that that was? [407]

A. Well, that was—I could not say for certain how far it was, but I would estimate it to be around about three miles when her lights would have come in view.

Q. You say you could not see the lights of the

(Deposition of E. P. Gillette.)

“Boston Maru” until you were within three miles of her?

A. I could not say for certain, unless I measured it off on the chart and found out just how far you could see them.

Q. But your best judgment is that you could not see the lights of the “Boston Maru” until you were within three miles of her? A. Yes, sir.

Q. Does that mean that when you were within three miles of the “Boston Maru” you could distinguish that she was a vessel? A. No, sir.

Q. You could not see the lights at all until you came within three miles of her? A. No, sir.

Q. How long would it take the “West Keats” to run three miles at a speed of eight and eighty-four hundredths miles an hour, do you know?

A. I could figure it up for you. Let’s see. It should be making about—it would take about twenty minutes at that speed.

Q. It would have been very easy to have stopped the “West Keats” in twenty minutes, wouldn’t it?

A. Yes, sir.

Q. There was no attempt made, was there, by the pilot, to pass the “Boston Maru” between the “Boston Maru” and the Washington shore?

A. No, sir.

Q. You never reported to the pilot that the “Boston Maru” lay ahead? [408] A. No, sir.

Q. Have you any explanation to offer as to why the “West Keats” did not obey her helm in response



(Deposition of E. P. Gillette.)

to the last two orders given by the pilot before the collision?     A. Yes, sir.

Q. What is your explanation of that?

A. That she was going along close to the Oregon shore and the suction of the shore, with the speed of the vessel going by, would have a tendency to draw her stern in towards the shore and throw her bow away.

Q. You think that suction was strong enough to overcome the maneuvers of the vessel?

A. Yes, sir.

Q. How far were you from the Oregon shore at the time the last order was given?

A. I could not tell.

Q. How far were you from the Oregon shore when the order, starboard a bit, was given?

A. I could not say.

Q. Could you see the Oregon shore?

A. I could not see the shore line. I could see the outline of the hills there.

Q. But you were not close enough to make out the shore itself?     A. No, sir.

Q. You thought there was room to pass the "Boston Maru" on the Oregon side, though, didn't you?

A. Yes, sir.

Q. And you knew that it wasn't safe to get too close to the shore?     A. Yes, sir.

Q. But even with that knowledge you thought there was room to [409] make the maneuver by going between the "Boston Maru" and the Oregon shore?     A. Yes, sir.

(Deposition of E. P. Gillette.)

Q. And you continued to think so?

A. Yes, sir.

Q. Up until one minute before the collision?

A. Yes, sir.

Q. How close did you come to the "Boston Maru" after the collision, when you came up on the Washington side of the "Boston Maru"?

A. Well, we came within hailing distance of her, so that the pilot could ask if there were any damage done to them, if they needed any assistance; probably a couple of hundred feet off, or a hundred feet.

Q. Plenty of water there, was there?

A. Yes, sir.

A. As a matter of fact, there was plenty of water for quite a good distance toward the Washington shore from where the "Boston Maru" was anchored, wasn't there?

A. I could not say as to that.

Q. How far is the bridge back of the bow of the "West Keats"?

A. It must be about one hundred eighty feet.

Q. And the pilot-house is on the bridge?

A. Yes, sir.

Q. The center of the bridge?      A. Yes, sir.

Q. You are not sure one way or another about the lookout having reported the "Boston Maru"?

A. No, sir.

Q. And therefore you can't give any indication as to when, if [410] at all, the lookout discovered the "Boston Maru" with reference to the time when you discovered it?      A. No, sir.

(Deposition of E. P. Gillette.)

Q. You don't know whether anybody had discovered it before you did?

A. The pilot must have, being familiar with the river and knowing what lights are along the shore.

Q. You are satisfied he discovered it before you did?     A. Yes, sir.

Q. You were looking, though, all the time, weren't you?     A. Yes, sir.

Q. You had been running for some minutes on a course which showed you a number of lights ahead?     A. Yes, sir.

Q. And as an experienced seaman you were looking to see what those lights were and what was going to come of it?     A. Yes, sir.

Q. And the "West Keats" continued full speed ahead from the time you went on watch at midnight until one minute before the collision?

A. Yes, sir.

Q. You now know, you say, that there is an anchorage ground in that vicinity?     A. Yes, sir.

Q. And for at least three miles above the point where the "Boston Maru" was anchored you could see a number of lights?     A. Yes, sir.

Q. Couldn't you see those lights for five miles?

A. I don't think so.

Q. Couldn't you see them for four miles? [411]

A. I don't think so. That three miles is only an estimate. I don't know.

Q. You are not certain how far you could see them?     A. No, sir.

(Deposition of E. P. Gillette.)

Q. How far away was the "Boston Maru" when you say that you made out that it was a vessel?

A. Less than a mile.

Q. Less than a mile?     A. Yes, sir.

Q. Visibility was good that night?

A. Yes, sir. However, it was very dark; no stars or moon; the sky was overcast, but lights showed up very good.

Q. Lights show up better when there is no moon than when the moon is shining, don't they?

A. Yes, sir.

Q. And you say that on that kind of an evening you were unable to make out that those lights meant that there was a vessel there at anchor, until you were within a mile?     A. Yes, sir.

Q. At that rate of speed you travel a mile in about seven minutes?     A. Yes, sir.

Q. You did, then, recognize that the "Boston Maru," or some vessel, was anchored there approximately seven minutes before the collision?

A. Yes—no, sir; less than a mile.

Q. Less than a mile?     A. Yes, sir.

Q. Well, how much less than a mile?

A. It was probably between a half and two-thirds of a mile that I knew it to be a ship. [412]

Q. You didn't recognize that the lights which you saw just ahead were the anchor lights of a vessel until you were within two-thirds of a mile of her?

A. No, sir.

Q. And you don't think that the pilot did either?

A. I think that he did.

(Deposition of E. P. Gillette.)

Q. How far away was the "Boston Maru" from the "West Keats" when in your opinion the pilot realized that those lights were the anchor lights of a vessel?

A. I could not say as to that. He didn't tell me when he seen it.

Q. Well, when was it that you saw from his actions that he saw the vessel? How far was she away then?

A. Well, that was when he gave the starboard a bit, order.

Q. How far away was she?

A. About three or four minutes before he struck; about the time that I knew that it was a ship.

Q. He gave that order just about the time that you found there was a ship at anchor there?

A. Yes, sir; slightly after.

Q. And you say that was approximately three or four minutes before the collision? A. Yes, sir.

Q. So far as you know, the pilot did not realize those lights were the anchor lights of a vessel until three to four minutes before the collision?

A. No, sir.

Q. And you don't know that the lookout realized that there was a vessel ahead until that time, either?

A. No, sir.

Q. And you yourself did not realize it until that time? [413] A. No, sir.

Q. Where is the rough log of the "West Keats"?

A. It should be on board the "West Keats."

Q. In custody of the captain? A. Yes, sir.

(Deposition of E. P. Gillette.)

Q. I refer to the rough log in which you made these entries, the log that was in use on the 25th of October, 1924.     A. Yes, sir.

Q. That log, you say, should be on board the vessel and in the custody of the captain?

A. Yes, sir.

Mr. McCAMANT.—I give notice to counsel for the “West Keats” to produce the rough log referred to by the witness, at the trial of the cause, I think that is all.

Redirect Examination by Mr. SNOW.

Q. In bringing a vessel like the “West Keats” to a stop, to an anchorage, we will say, from full speed ahead, would it be necessary to stop the engine some time before you intend to make the anchorage?

A. Yes, sir.

Q. About how long in point of time before?

A. Before coming to an anchorage?

Q. Yes. Let’s assume that the vessel was going down a river like the Columbia, going down the Columbia.

A. Yes, sir. They would have to slow down about a half an hour before coming to an anchor.

Q. What would they do first, slow to half speed?

A. Probably full to half, or full to slow speed, either one. [414]

Q. And then later what would the master do, or pilot?

A. It would just depend on how much way he had on the ship when he was coming up to his anchorage.

(Deposition of E. P. Gillette.)

He might have to go full astern or half astern in order to stop the headway of the vessel.

Q. Now when he put the vessel full astern, if he did, what would be the effect on steering the vessel, if she had way on?

A. You could not steer her.

Q. It would— A. It would throw her.

Q. It would generally throw her bow to starboard? A. To starboard; yes, sir.

Q. Is it easy to tell in advance just how far her bow would be thrown to starboard by that full speed astern engine?

A. It would depend on how long she kept going full speed astern. It would not go full astern long enough to bring the vessel to a stop and still be able to steer her.

Q. In other words, the pilot would have to set her full speed astern and then in a little while stop?

A. Yes, sir.

Q. And bring her bow around, would he?

A. Yes, sir.

Q. And then give her full speed again?

A. Yes, sir.

Recross-examination by Mr. McCAMANT.

Q. Well, do I gather from your testimony, Mr. Gillette, that you say it would take a half an hour to stop that vessel?

A. Not if she was going to go full speed astern, from a full ahead to a full astern, it would not take a half an hour; but if he was going to stop her, coming to an anchorage, and still [415] be able to

(Deposition of E. P. Gillette.)

steer the vessel, it would take about a half an hour, because you could not throw her full speed astern and keep her going full speed astern in a river the size of the Columbia, long enough to bring her to a dead stop.

Q. You mean that you would have to go full speed astern for a time and then the order would be to stop?

A. Stop and maybe slow ahead enough to swing the ship's head around again into the channel.

Q. And you say that those maneuvers would take a half an hour before you could get the vessel stopped?

A. Before you could stop her enough to come to an anchorage, it would take close to a half an hour.

Q. That is, you are figuring on anchoring the "West Keats"? A. Yes, sir.

Q. As a matter of fact, after the vessel has gone full speed astern for as much as five minutes her headway is broken, isn't it?

A. It is checked considerably; all right, but she would still be going ahead. It would take about fifteen minutes to stop her headway.

Q. Suppose she is going at a speed of eight and eighty-four hundredths miles an hour and you put her full speed astern for a five minute period, what headway would she have at the end there?

A. Well, that would be just—I could only give you what I would judge her headway to be. Four miles an hour; about that, I should judge.



(Deposition of E. P. Gillette.)

Q. You think it would take five minutes full speed astern to take off half the running speed of the vessel?

A. Yes; it would take more than five minutes to take off half of it.

Q. It would? [416] A. Yes, sir.

Mr. McCAMANT.—That is all.

And further deponent saith not.

Signature waived.

Filed July 2, 1926. [417]

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AND there was duly filed in said court a deposition of EINAR GIDLOF, a witness on behalf of the United States, in words and figures as follows, to wit: [418]

DEPOSITION OF EINAR GIDLOF, FOR THE  
GOVERNMENT.

Direct Examination.

(By Mr. MAYTHAM.)

Q. Will you give your full name?

A. Einar Gidlof.

Q. Where do you reside, live?

A. I am employed on the "President Taft" at the present time.

Q. Do you have, in the city, a mailing address?

A. 59 Clay Street, San Francisco.

Q. In what capacity are you employed on the "President Taft" at the present time?

A. I beg pardon?

(Deposition of Einar Gidlof.)

Q. In what capacity are you employed on the "President Taft" at the present time?

A. I am storekeeper.

Q. Is the "President Taft" soon to sail?

A. Yes, sir, to-morrow afternoon at 4 o'clock.

Q. And when will she return?

A. Two months from now.

Q. Where is she bound?     A. Orient.

Q. How long have you been going to sea?

A. Oh, for about sixteen years now; around sixteen years.

Q. On October 26, 1924, how were you employed?

A. As able seaman.

Q. On what vessel?

A. On the "West Keats." [419]

Q. At that time, on the early morning of October 26, 1924, was the "West Keats" bound down the Columbia River?     A. Yes, sir.

Q. And how were you serving on the vessel at the time?     A. I was on the wheel.

Q. At the wheel?     A. Yes, sir.

Q. In the pilot-house?     A. Yes, sir.

Q. Who was in the pilot-house with you?

A. The second officer.

Q. Do you know his name?     A. Mr. Gillette.

Q. When did you go on watch?

A. 12 o'clock, midnight.

Q. Do you recall a collision occurring during your watch?     A. Yes, sir.

Q. Do you recall the name of the vessel you collided with?     A. "Boston Maru," a Japanese ship.

(Deposition of Einar Gidlof.)

Q. Do you know about what time that collision occurred? A. Well, just a little before 2 o'clock.

Q. Had you been at the wheel, from the time you came on watch, at 12 o'clock, until the time of collision? A. Yes, sir.

Q. You were at the wheel at the time of collision?

A. Yes, sir.

Q. What kind of steering gear does the "West Keats" have? [420] A. Telemotor.

Q. That is, the electric telemotor?

A. Well, I don't know much about it.

Q. It is what is known as the telemotor gear?

A. Telemotor gear; yes.

Q. You steered the vessel, from the time she left her wharf, until the time of collision? A. Yes, sir.

Q. Did the vessel steer properly?

A. Yes, sir, she steered fine.

Q. Her steering gear all in good working condition? A. Yes, sir.

Q. Where is the engine-room telegraph indicator located on the "West Keats"?

A. On the starboard side from the wheel.

Q. In the pilot-house? A. Yes, sir.

Q. Who was attending to the telegraph instrument? A. The second officer.

Q. On the occasion that you were going down the Columbia River?

A. The second officer was standing right across to the telegraph, all the time.

Q. And he was passing signals on that instrument to the engine-room? A. Yes, sir.

(Deposition of Einar Gidlof.)

Q. Was he also paying attention to your work?

A. Yes, sir, he was standing close to me, it is only a small [421] little place, there is only 2 or 3 feet between the wheel and the telegraph, he was watching the steering all the time down the river.

Q. Did you carry out, at all times, all of the orders that were given to you for the direction of the wheel?     A. Yes, sir.

Q. Now, what is your usual practice in steering down the Columbia River, do you do so by compass, or otherwise?

A. No, sir, we do not use the compass, we used to take them out from shore lights and things like that in the river, so we can see when the ship turns quick.

Q. That is the manner that you were proceeding down the Columbia River at the time?

A. Yes, sir.

Q. Do you know who was acting as lookout?

A. It was a man by the name of Olsen.

Q. Olsen?     A. Yes.

Q. He was your partner, was he?     A. Yes.

Q. Where did he stand his watch?

A. On the fore-castle-head.

Q. Did you see the steamship "Boston Maru" before the collision?

A. No, sir; I did not see it.

Q. You were busy with your duties as helmsman?

A. Yes, sir.

(Deposition of Einar Gidlof.)

Q. Do you know what helm orders were given to you, prior to the [422] collision?

A. No, I don't know now, I don't remember it now.

Q. What lights, if any, were burning in the pilot-house?

A. Well, there was no light except a little on the telegraph, that is all that can be shown in the pilot-house, it was dark there.

Q. Was the pinnacle light lighted?

A. Yes, sir.

Q. Where was that with reference to you?

A. You know that little small opening on the compass light?

Q. That was in front of you?      A. Yes, sir.

Q. You had been helmsman a great many times, had you, on vessels?      A. Yes, sir.

Q. And you had been at sea some fourteen years prior to this time?      A. Yes.

Q. And how old are you?      A. I am thirty.

Mr. MAYTHAM.—That is all.

Cross-examination.

(By Mr. BLACK.)

Q. Where had the "West Keats" been, just prior to her starting on this voyage, Mr. Gidlof?

A. Where had she been?

Q. Yes, at Portland?

A. Yes, we come from Portland, right from Port Portland.

(Deposition of Einar Gidlof.)

Q. Do you know anything about the draught of that vessel, fully [423] loaded?

A. No, sir; I cannot say; it was somewhere around 25 feet, I guess; I cannot say for sure, though.

Q. You don't know anything about how much cargo she had aboard at the time, do you?

A. No, sir; she was full loaded, as much as she can be, she had a pretty high deck-load and as much as she can carry.

Q. She was pretty well loaded, you think?

A. Yes, sir.

Q. Do you know what port you went to after this collision?     A. After we went out?

Q. Yes.     A. We went to Yokohama first.

Q. Did the "West Keats" go back any place for repairs afterwards?

A. Oh, yes; we turned right back and went back to Portland again, and they repaired her inside the dock there.

Q. And then you proceeded direct to Japan?

A. Yes, sir.

Q. So that you had all the cargo at American ports that you were going to take?     A. Yes, sir.

Q. Do you know where St. Helen's Bar is in the Columbia River?

A. I know where St. Helen's is, but I do not know the water around there, I know where St. Helen's is, but I did not know the ground there, or anything else.

(Deposition of Einar Gidlof.)

Q. Do you know where St. Helen's Bar is in the middle of the [424] stream opposite St. Helen's?

A. Well, there is a channel there right outside of St. Helen's, but I did not know much about that.

Q. You do not know on what side of the Bar the "West Keats" passed that evening, do you?

A. No, sir.

Q. Do you know whether it was near the Oregon side of the river or the Washington side of the river?

A. I do not know that; I do not know that place up there at all.

Q. You are just unable to say?

A. No, I cannot say that.

Q. Do you remember what kind of a night it was?

A. Oh, it was very dark, but there was no fog or anything like that, it was a very dark night.

Q. It was dark but no fog? A. No, sir.

Q. You could see lights a long distance, though, couldn't you, a night of that kind?

A. Yes, it was not foggy, you could see all right there.

Q. You didn't notice any lights ashore at all, did you?

A. No, I was steering all the time, because it is very narrow up there and you have to put your mind to the steering all the time.

Q. And when you say if you do not steer by the compass you mean that they do not give you a course by compass direction, but you use your com-

(Deposition of Einar Gidlof.)

pass to keep on that course, don't you, until you get a change of helm?

A. No, sir, you just get a shore light, or a buoy in the [425] river and the pilot tell you, "You see that buoy there?" "Yes." "Well, take that so and so, either port or starboard."

Q. Do you keep your eye on that buoy ahead?

A. I do not pay any attention to anything else, lights around, just that route where I am steering after.

Q. Do you remember any particular light or landmark that you were steering for just prior to this collision?

A. No, I cannot remember there; I had a light there but I do not remember now which side it was, but I was steering on that all the time down the river, then we shifted the course several times, of course, but, at that time, we were going steady, and then they changed the course, and I do not remember exactly what side it was, or anything like that.

Q. You recollect there was a change of course, just prior to the collision. A. Yes, sir.

Q. Did you see the other vessel at all any time before you actually struck her?

A. No, sir, I did not see her, I did not see no vessel at all around there before we hit.

Q. Did you notice the other vessel after the collision? A. Oh, yes, sir.

Q. Did you notice any lights on the other vessel?



(Deposition of Einar Gidlof.)

A. She just—we hit her right in the stern, something like that, she just—we just hit her in the after end of the rail there, and then she was gone. We just passed her quick, it was only a matter of a few seconds and we passed her. [426]

Q. Now, do you remember on what side of the vessel you passed her?

A. It was on the starboard bow.

Q. Your starboard bow struck the starboard quarter, did you say? A. Yes, sir, the starboard bow.

Q. Your starboard bow struck the starboard quarter of the vessel?

A. Oh, I would not say the starboard quarter of the other vessel.

Q. Somewhere near her stern? A. Yes, sir.  
of the starboard side?

Q. You do not remember whether it was the port

A. No, sir, I could not say that.

Q. It must have been her starboard side, must it not?

A. I don't know, but our starboard bow, on the "West Keats" was damaged, I know that.

Q. If it was your starboard bow, it must have been the starboard side of the other ship that was hit, isn't that so?

A. Well, I did not see that ship, I do not know how she was laying there, she was at anchor, that ship.

Q. You struck her and then you went on by?

A. Yes, sir.

(Deposition of Einar Gidlof.)

Q. And she was on your starboard hand when you went on by? A. I did not see that ship at all.

Q. You didn't see her at all?

A. I didn't see her, just when we hit her, she was gone inside or two or three seconds, we passed her.

Q. And did you turn around and come back again? [427]

A. And then we turned around and came back again, and come up alongside of her, and we went back to Portland right away.

Q. Did you hear any call from your lookout in the fore-castle-head just prior to the collision?

A. No, sir, I did not hear that.

Q. Was there a pilot on your bridge as well as your second officer?

A. There is a pilot up outside on the bridge, outside of the pilot-house on the bridge.

Q. Is the pilot-house open to the bridge, or is there a door that is closed all the time?

A. There are windows from the place to the door to the bridge from the pilot-house.

Q. Are those windows opened?

A. I do not know now whether they were opened, I cannot say.

Q. How does the pilot communicate with the second officer, does he have to open a window or a door?

A. Through those windows, they must be open then.

Q. The windows are kept open?

A. And the doors on both sides were open, there

(Deposition of Einar Gidlof.)

are two doors on each side, one door on each side, and a window was in front, you shove up and down.

Q. Did the pilot make any remark that you heard, just prior to the collision?

A. No, not that I remember of.

Q. Did you have any idea that a collision was about to happen before it occurred?

A. No, I had no idea. [428]

Q. You say you don't know whether you were passing the "Boston Maru" on the Washington side or the Oregon side?

A. I couldn't say that, because I am not acquainted up there at all, I cannot say which is Washington and the Oregon side, I don't know at all.

Q. You are not familiar with the Columbia River?

A. No, sir.

Q. How many times have you been up there?

A. Oh, I have been up there several times before, but I never paid any attention to a thing like that. I have been up the river several times.

Q. Do you remember whether you were closer to the left-hand bank of the river than the right-hand bank, or the other way around?

A. Yes, sir, I know that when I go up there, but I do not remember it now, which side it was.

Q. You do not remember it in this case?

A. I do not remember it, no; it is pretty near two years ago, and I cannot say for sure which side it was.

(Deposition of Einar Gidlof.)

Q. You are sure, however, that it was your star-board bow that struck the other vessel?

A. Yes, sir.

Q. And you do not know how the other vessel was headed when you struck it?     A. I have no idea.

Q. Have you any idea how far out you were from the bank at the time the collision occurred?

A. No, I don't know that     [429]

Q. I suppose you don't know what the state of the tide was, at the time, do you, whether it was ebb or flow, or what it was?     A. No, I cannot say.

Q. That was not your job anyway?

A. No, sir, I had nothing to do with that.

Q. Do you alternate with the lookout on your watch?

A. I come on watch at 12 o'clock, and he went forward and I went to the wheel and that is the last I saw of him.

Q. And when did you change again, 2 o'clock?

A. 2 o'clock; yes, sir.

Q. In other words, you stand half your watch as helmsman and half as lookout; is that the way you work it?     A. Yes, sir.

Q. And his name is Olsen?     A. Yes.

Mr. BLACK.—I believe that is all.

Mr. MAYTHAM.—That is all.

Filed September 17, 1926.     [430]

(Deposition of Lee O. Jetts.)

AND there was duly filed in said court a deposition of Lee O. Jetts, a witness on behalf of the United States, in words and figures as follows, to wit: [431]

DEPOSITION OF LEE O. JETTS, FOR THE GOVERNMENT.

LEE O. JETTS was thereupon produced as a witness in behalf of the owners of the steamship "West Keats" and, having been first duly sworn, testified as follows:

Direct Examination by Mr. SNOW.

Mr. SNOW.—Your full name is—

A. Lee O. Jetts.

Q. And you are at present employed by the State of Oregon, are you?     A. Yes, sir.

Q. In what capacity?

A. Boiler and factory inspector.

Q. In what department?     A. Bureau of Labor.

Q. I call your attention to the collision between the "West Keats" and the "Boston Maru," which occurred October 26, 1924, at forty-four minutes after one in the morning, and ask you if you recall the collision?

A. Well, I recall the time of it. I didn't know of any collision [432] at the time it happened.

Q. You were on the "West Keats" at the time, were you?

A. I was on the "West Keats" at the time; yes, sir.

(Deposition of Lee O. Jetts.)

Q. In what capacity?

A. Second assistant engineer.

Q. Do you hold marine papers, engineering papers? A. Yes, sir.

Q. What papers do you now hold?

A. Second assistant.

Q. When did you go on watch?

A. Twelve o'clock, midnight.

Q. That was an hour and forty-four minutes before the collision, as I have given you the time?

A. Yes, as you have given me the time.

Q. Where was the "West Keats" proceeding at the time you went on watch?

A. Proceeding down the river, headed for Yokohama.

Q. Out of the port of Portland?

A. Out of the port of Portland, yes.

Q. At what speed was the vessel proceeding or put at twelve o'clock?

A. Well, the vessel was stopped when I went on watch, and I got a full ahead bell just at twelve o'clock as I took over the watch, and the first assistant handled that bell; and we went full speed from then on.

Q. What was the next bell that you got after that full speed ahead bell, and what time it was when you answered that again? You may refresh your memory by examining the photostatic copies of the engine-room logs of the "West Keats," which have been okehed by the parties. [433]

(Deposition of Lee O. Jetts.)

Mr. KING.—Did he make the entries himself in this log? A. This is the chief engineer's log.

Mr. KING.—Did you make the entries in the log?

A. No, sir, the chief engineer made those entries, a copy of the rough log, off of the engine-room.

Mr. KING.—Have you got the rough log?

Mr. SNOW.—No, the copy of the rough log is attached to the deposition of Chief Engineer Bergeseth, and I haven't got a copy here of that rough log. I don't think there will be any dispute about the time of these bells.

Mr. KING.—Well, subject to that objection, and you can check it later if there is any variance—subject to that reservation you may go ahead.

Mr. SNOW.—Q. Now, take this photostatic copy of the chief engineer's log, and state what was the next bell you got after the full speed ahead bell at twelve o'clock midnight?

A. The stop bell at one forty-three.

Q. What was the next bell received after that?

A. Full astern, one forty-five.

Q. Were those two orders obeyed? A. Yes, sir.

Q. By whom? A. By me.

Q. What were you doing immediately before the stop bell at one forty-three?

A. Just before that I was pumping bilges on the port side, and was out on the port side to look at that, and I just came back probably half a minute before I received this bell.

Q. Came back where? A. To the throttle.

(Deposition of Lee O. Jetts.)

Q. And where were you at the instant that the bell sounded? [434] A. Right at the throttle.

Q. You have already testified that you obeyed the bell? A. Yes, sir.

Q. How long a time elapsed between the time the bell sounded and the time you obeyed it?

A. That was not a matter of over a couple of seconds; just as quick as you could reach a throttle and shut it off.

Q. Was the full astern bell at one forty-five obeyed in the same way? A. Yes, sir.

Q. In what condition were the engines on the "West Keats"? A. In good condition.

Q. Anything wrong about the manner in which they worked and operated? A. No, sir.

Q. Are you informed of the condition of the steering engines on the "West Keats" at that time?

A. No serious condition that I knew of.

Q. Nothing wrong that you knew of?

A. Not that I heard of.

Q. Had you inspected them recently?

A. Not personally myself went over all of it, no.

Q. Now, the chief engineer's log shows other bells after one forty-five A. M., and, without going into detail, I will ask you if you obeyed those bells that fell within your watch? A. Yes, sir.

Mr. SNOW.—That is all.

Cross-examination by Mr. KING.

Q. Now, Mr. Jetts, what papers did you hold at the time of this collision? [435]

A. Second assistant.



(Deposition of Lee O. Jetts.)

Q. How long had you held them?

A. If I remember right, I had had a second assistant's license probably three months before.

Q. How long had you been going to sea?

A. About 1914 or 1915.

Q. Had you worked in engine-rooms all the time?

A. Yes, sir.

Q. Now, you say the first assistant got the full speed ahead bell just before you went on watch at midnight?

A. The first assistant. He was on the throttle before I went on watch, and I was looking over things just before I took the watch over.

Q. And while you were looking things over, just before midnight, he got the full ahead?

A. Yes, sir.

Q. Did he set the throttle full ahead?

A. Yes, sir.

Q. And you kept the throttle full ahead until the one forty-three bell? A. Yes, sir.

Q. Now, when you got that bell, how did the message come to you; did some bell ring down there?

A. The telegraph.

Q. Was that a bell?

A. Well, it is a bell with a hand pointing, "Slow," "Full," or "Stop," or whatever—

Q. Did the telegraph show "Stop" at one forty-three? A. Yes, sir.

Q. How did you know it was one forty-three?  
[436] A. By the clock.

(Deposition of Lee O. Jetts.)

Q. Was the clock right in front of it—by the telegraph? A. It was right by the left.

Q. You looked at the clock? A. Yes, sir.

Q. You did not make the entry then, did you?

A. No, sir; the oiler made the entry.

Q. You made no entries in the rough log, then?

A. Not right at that time.

Q. Did you make the entry of the “full astern”?

A. No, sir.

Q. Who made that? A. The oiler made that.

Q. Now, these subsequent bells, after the “full astern,” the number of bells you got there, you obeyed those, did you? A. Yes, sir.

Q. Did you make the entries each time?

A. No, sir.

Q. They were made by the oiler, also?

A. Well, as far as I can remember, I think the oiler made the most of them.

Q. What was that oiler’s name?

A. George Baril.

Q. From the time after you went on watch at midnight to the time of one forty-five A. M., the engines were working in good order?

A. Yes, sir.

Q. Had no trouble at all?

A. Had no trouble at all, no, sir.

Redirect Examination by Mr. SNOW.

Q. By the way, did you write the rough log of that particular [437] board?

A. I wrote the rough log in the log-book afterwards, yes; a copy off of the bell-book.

(Deposition of Lee O. Jetts.)

Recross-examination by Mr. KING.

Q. What board was that?

A. It is a small blackboard there for bells and miscellaneous, and they use it there in the ship, use it lots of times for bells, and copy it in the log-book.

Q. Does that clock record seconds down there?

A. Yes, sir.

Q. You never enter any of them in the bell-book, do you? You enter the nearest minute.

A. Enter the nearest minute.

Q. If the bell was at one forty-two and a half, which way would you enter it, one forty-two and a half? A. One forty-three.

Q. If there is a half minute or more, you enter the next minute; is that it? A. Yes.

Mr KING.—That is all.

Mr. SNOW.—That is all.

(Thereupon the proceedings hereunder were adjourned.)

Filed October 6, 1926. [438]

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AND there was duly filed in said court depositions of S. Sayeki, Isokichi Chiga, Toyoji Tomita, H. Yokoi and N. Komiyama, witnesses on behalf of the claimant of the "Boston Maru," in words and figures as follows, to wit: [439]

DEPOSITION OF S. SAYEKI, FOR LIBEL-  
ANT.

S. SAYEKI was thereupon produced as a witness in behalf of the libelant and, having been first duly sworn, testified as follows:

Direct Examination by Mr. KING.

Mr. KING.—Just take your time, Captain, in answering questions and speak as loud as you can.

Q. Will you state your name, please, Captain?

A. Yes. My name is S. Sayeki.

Q. Where do you reside? What place do you live? A. Kobe, in Japan.

Q. Do you hold a master's license?

A. Yes, sir.

Q. From what government?

A. From Japanese government.

Q. And what license do you hold?

A. I have a master of first grade, of Japan.

Q. How long have you held that?

A. For three years now since I got ticket.

Q. What ship are you master of now?

A. "Boston Maru."

Q. When did you first join her as master?

A. I joined "Boston Maru" fourteenth of September of this year.

Q. Where? In what port? A. In Kobe, sir.

Q. In Kobe, Japan? A. Yes.

Q. And where did you bring her then?

A. I brought her up the Columbia, right through.

Q. Right through to Portland? [440]

(Deposition of S. Sayeki.)

A. Yes.

Q. Had you ever sailed a ship into Portland before? A. What is that, sir?

Q. Was this the first time you had ever brought a ship to Portland?

A. Well, I came here many times when I was chief mate, but first time I come as master of the steamer.

Q. The first time?

A. Yes, to come down as master of a steamer.

Q. Well, did you ever come to this very port, to this same place, before? A. Beg pardon, sir?

Q. Did you ever come to Portland, Oregon?

A. Yes.

Q. You came to the United States, but did you ever come to Portland, Oregon, before?

A. Yes; I came very many times when I was chief mate, but the first time to come down as master of the steamer.

Q. Had you loaded lumber at St. Helens, Oregon, on those previous trips?

A. Yes. When I had the collision I was just waiting for tide, so it was before going in St. Helens. But in Portland I had about four million lumber on board, sir.

Q. Yes, I know; you were loaded before you started down the Columbia River? A. Yes.

Q. But on these trips when you were first mate, you know— A. Yes.

Q. Did you get lumber at St. Helens on those trips? A. No; no, sir.

(Deposition of S. Sayeki.)

Q. Are you familiar with the channel of the Columbia River from [441] below Portland to the ocean?

A. No, sir, I am not familiar with it at all, sir.

Q. When did you leave Portland with the "Boston Maru" to go to St. Helens; what date?

A. About five P. M. on twenty-fifth, sir.

Q. The twenty-fifth of October; is that it?

A. Yes, sir.

Q. 1924? A. Yes, sir.

Q. And did you request a pilot to take you down the river? A. Yes, sir.

Q. Did a pilot come on board?

A. Yes; he came on board about after five o'clock; I don't remember exactly.

Q. What did he do after he came on board?

A. Well, he said—

Q. I don't care what he said. Do you want what he said, or anything?

Mr. SNOW.—Go ahead. I will ask him further.

Mr. KING.—All right.

Q. What did he do?

A. He just came on board to take the ship down to St. Helens. That is what he said.

Q. Who was in charge of the ship from Portland down to St. Helens then.

A. You mean the pilot, sir?

Q. Well, who was in command?

A. Well, at that time the pilot was taking charge for the visit down.

(Deposition of S. Sayeki.)

Q. And about what time did the ship, if you know, arrive off of [442] the Columbia City lights?

A. About eight o'clock, sir.

Q. What happened then? What was done?

A. Well, just swing the ship and drop the anchor; that is all.

Q. Who ordered the ship swung?

A. Why, I don't say nothing.

Q. Who did? A. The pilot did.

Q. All right. You didn't say anything?

A. No; I didn't say anything at all.

Q. Did he say what to do with the anchors?

A. Yes. He said, "We are going to anchor."

Q. Did he command what anchor should be let down? A. Yes.

Q. What anchor did he say to be let down, which one?

A. Well, he said, "Anyone is all right," he said; so we stand by for the starboard anchor.

Q. Did he tell you to put any other anchor down after you put the starboard anchor down?

A. No, sir.

Q. Did he direct where the ship should be anchored? A. Beg pardon, sir?

Q. Did the pilot direct or did the pilot order where the ship should be anchored? A. Yes.

Q. What place?

A. No, he don't say nothing; just he said, stand by anchor, and let go anchor, sir.

Q. And the pilot was in command up to time ship came to anchor; is that right? [443]

(Deposition of S. Sayeki.)

A. Yes, sir.

Q. Then where did the pilot go?

A. And the pilot went in saloon to sleep while high water come up.

Q. You mean the tide? A. Yes.

Q. The tide. Was it low tide when you anchored?

A. When I anchored the current was going down.

Q. Going downstream? A. Yes.

Q. What did you do, if anything, after the ship was anchored; about her position or anything, what did you do?

A. Yes. I said to second mate to take a cross-bearing of the anchorage.

Q. Who did you tell that?

A. That for my interest I took the cross-bearing.

Q. Yes, but who did you tell to do that?

A. No; nobody said it but I said it.

Q. I know, but what one of your men did you tell to take cross-bearing? A. To second mate.

Q. The second mate. Now, when you came to anchor what did you do about the ship's lights?

A. After I dropped the anchor hoisted two anchor lights.

Q. Where did you hoist those anchor lights?

A. One anchor light on forestay and one on the flagstaff aft.

Q. Just tell how high up above the hull the one on the forestay was, how many feet.

A. About thirty-seven feet from forecastle deck; thirty-seven or thirty-six feet, I think.

Q. And where is this flagstaff aft, what part?

[444] A. On poop, sir.



(Deposition of S. Sayeki.)

Q. Right on the poop? A. Yes.

Q. And how high on the flagstaff did you hang the anchor light?

A. About sixteen or seventeen feet from deck, sir.

Q. What kind of lights are these anchor lights you use? A. Oil lamps, sir.

Q. About what size?

A. About one foot, sir (witness indicating).

Q. Indicate again.

A. About one foot (indicating).

Q. About one foot? A. Diameter.

Q. Diameter? A. Yes; one foot diameter.

Q. What kind of glass do they have around them?

A. Prism glass, sir.

Q. What color lights were those anchor lights?

A. White.

Q. White? A. Yes, sir.

Q. Now, what was the kind of weather you had there that night when you came to anchor?

A. When I came to anchor it was rainy and squally weather.

Q. Was there any fog? A. No, sir.

Q. No fog. Could you see lights well that night?

A. Yes; you could see all lights, sir.

Q. How far could you see an ordinary light?

A. Ordinary night, sir? [445]

Q. How far can you see light?

A. Well, we can see at least four or five miles, at least.

Q. At least four or five miles?

A. Yes. If I use glass I can see more than that.

(Deposition of S. Sayeki.)

Q. I mean without a glass; four or five miles without a glass? A. Yes.

Q. Now, getting back to these bearings, did the mate bring you some bearings later on? A. Yes.

Q. After you ordered him to do so? A. Yes.

Q. Did you make any record of those bearings, write them down anywhere?

A. Well, he took cross-bearing and showed the anchorage on the chart and I found out that place is all right.

Q. But you looked it over, did you?

A. Yes, I looked it over.

Q. Did you check the bearings?

A. No, I didn't check bearings, but he just put down cross-bearing position and I approved it for him.

Q. Just explain what you did, the actual things you did. That is the best way to get at it.

A. Yes. The second mate took the bearings and he draw lines of bearings on chart and find out position, so he showed me.

Q. He showed it to you?

A. Yes, the chart; so I took a parallel rule and examined that line, and I approved it all right. I approved that line; I examined the line of the cross-bearings.

Q. The line you examined? A. Yes. [446]

Q. And you found it all right? A. Yes.

Q. Have you got the log-book here?

A. Yes, I have it with me.

Q. Where is it, Captain? Is that it in there?

(Deposition of S. Sayeki.)

A. Here it is (witness producing same).

Q. I hand you book, Captain; what is that?

A. This is the deck log-book, sir.

Q. Deck log-book? A. Yes, sir.

Q. Will you turn to the page where those bearings are entered. A. Here they are, sir.

Q. Which page is this, which of the two?

A. Cross-bearings are taken through here (indicating).

Mr. KING.—Will you mark this page Libellant's Exhibit 1, Mr. Reporter.

Mr. SNOW.—Just a minute. I object to the introduction of the log-book, or any of the entries from the log-book, on the ground they are not the best evidence, that they are hearsay and a self-serving declaration.

Mr. KING.—I will offer it in a minute. What I want to do is just to offer it so the Court can examine it. Will you mark the page?

Mr. SNOW.—Its introduction in evidence is objected to for any purpose.

(The page referred to of said deck log-book was thereupon marked Libellant's Exhibit 1.)

Q. (By Mr. KING.) Captain, I direct your attention to a book, a page of which is marked Libellant's Exhibit 1; is that the page of the deck log in which your bearings are entered? [447]

Mr. SNOW.—Objected to on the same grounds.

A. Yes.

Mr. KING.—Well, this is preliminary.

(Deposition of S. Sayeki.)

The WITNESS.—This is the cross-bearing there, and wrote next day that (indicating).

Mr. SNOW.—Pardon me, Captain. May I have an understanding that my objections to the use of the log-book extend to all of these questions, so I won't have to be repeating it to each question?

Mr. KING.—I don't want to be technical at all, but I am just identifying it. I am not offering anything out of this log-book yet; I am just laying the foundation. I want to make an offer; then I think you can make your objection and we will let it ride then, and I will let him testify as of his own knowledge of the fact also.

Mr. SNOW.—Well, then, I will make my objections.

Mr. KING—Libelant now offers in evidence page of a bound book entitled "Deck Log-Book, S. S. 'Boston Maru,' " marked Libelant's Exhibit 1, the same being dated at the top thereof 25th October.

Mr. SNOW.—I object to the introduction of the log-book, or any page of it, or any figures from it, or writing from it, on the ground that it is not the best evidence, is hearsay, and a self-serving declaration.

(Said page marked Libelant's Exhibit 1 is filed herewith as a part of this deposition.)

Q. (By Mr. KING.) Are those notations in the log-book in your own handwriting?

A. This is the chief mate's writing.

Q. The chief mate's? A. Yes. [448]

(Deposition of S. Sayeki.)

Q. Captain, will you draw the lines of the bearing on the blue-print that you have with you of the channel, out on this other table where you have a flat surface. Can you do that?

A. I can show you which direction we took bearing, but if you have any good instrument I can show you right away. We should have station pointer, an instrument called station pointer. Just approximately I can show you all right.

Mr. ILLIDGE.—Captain, where is that blue-print you drew? You drew this for me?

The WITNESS.—Yes.

Mr. ILLIDGE.—Where is that blue-print?

Q. (By Mr. KING.) Captain, are these bearings entered in your log-book according to the true compass or the magnetic compass?

A. The magnetic compass.

Mr. SNOW.—Objected to on the ground that the witness didn't take the bearings.

Q. (By Mr. KING.) Do you know, Captain, of your own knowledge? Do you know yourself?

A. Yes.

Q. According to what compass the bearings were taken? Did you see them taken?

A. Well, we take bearings by standard compass on our steamer.

Mr. SNOW.—The answer is objected to as not responsive, and I move to strike the answer.

Q. (By Mr. KING.) What kind of a compass do you have on your ship?

A. Dry compass I have.

(Deposition of S. Sayeki.)

Q. A dry compass? A. Yes.

Q. Is that a magnetic compass? A. Yes.

[449]

Q. Or what kind? A. Yes; magnetic compass.

Q. Have you any other kind of compass?

A. Well, I have a liquid compass also.

Q. But you didn't take your bearings yourself; the second mate took them, did he?

A. Yes.

Q. He will know what compass he took them by, I suppose?

A. Yes; the second mate will know about that.

Q. Now, when you checked these bearings how did you do that? How did you check them? How did you examine these entries?

A. Beg pardon, sir?

Q. You said you examined the bearings that the second mate put down. A. Yes.

Q. Is this the second mate's handwriting?

A. No; this is the chief mate's writing.

Q. The chief mate's?

A. Yes. Of course, in the rough log-book is stated all of these bearings, sir.

Q. Where is the rough log-book, Captain?

A. On board the ship, sir. I have not brought it with me. But this is exactly the same as the rough log-book, sir.

Mr. KING.—I thought you told them to bring both of them up here.

Mr. ILLIDGE.—I told them to bring both of them.

(Deposition of S. Sayeki.)

The WITNESS.—Yes, but it is a long way to go down to the ship, so I have no time to go down.

Q. (By Mr. KING.) Can you bring it up tomorrow morning early, or to-night at seven o'clock send somebody up with it? [450]

Mr. SNOW.—Send a messenger down for it.

The WITNESS.—Well, if I can send down messenger, all right.

Q. (By Mr. KING.) Where is the ship now, what dock? A. Terminal No. 4.

Q. Terminal No. 4, down at St. Johns?

A. Terminal No. 4, No. 5 pier.

Q. No. 5 pier at Terminal No. 4?

A. Yes. But I can swear this log-book,—it is exactly the same as the rough log-book.

Mr. SNOW.—Well, that is objected to on the ground that it is volunteered, and on the ground that the witness didn't do the writing; and I move to strike out the last statement of the witness.

Q. (By Mr. KING.) Well, who did the writing in this book?

A. For the deck log-book, sir?

Q. Yes. A. The chief mate.

Q. Where is the chief mate now?

A. He is on board, sir.

Mr. KING.—We will have to have him now.

Mr. ILLIDGE.—I asked them to bring both logs.

The WITNESS.—Yes, but I had no time to get them. I didn't go back.

Q. (By Mr. KING.) Now, Captain, I am go-

(Deposition of S. Sayeki.)

ing to ask you another question. You examined the bearings? A. Yes.

Q. Now, do you know yourself, without looking at anything being written down, do you know yourself just what the bearings of the ship were?

Mr. SNOW.—That is objected to as calling for a conclusion. [451]

Mr. KING.—I can ask him if it is within his own knowledge. I want to say I claim that question on this ground: I am dealing with a witness who has a vague knowledge of the English language, and I want to point out just what the following questions are being directed to.

A. I could not tell—I don't remember exactly; but if I saw the log-book I can tell you right away; because it is very difficult to remember for a long time. That is the reason I state it in the log-book.

Q. Now, of your own knowledge—not what somebody else told you, but of your own knowledge—

A. Yes.

Q. Do you know whether, after having examined the entries in the log-book— A. Yes.

Q. That they are correct?

A. Yes, they are correct.

Mr. SNOW.—My last objection and motion are repeated.

Mr. KING.—I claim the question on the same ground.

Q. I don't believe, Captain, you explained just how you checked this.

A. I could not explain in English, but in Japa-



(Deposition of S. Sayeki.)

nese I can explain better. It is very difficult to tell.

Mr. SNOW.—Captain, you are a good English student. You are an educated man.

The WITNESS.—Oh, no.

Mr. SNOW.—You can speak English as well as I can, and I can't speak Japanese.

Mr. KING—I am perfectly willing for you to have the assistance of an interpreter, but my friend Mr. Snow here can't call to [452] his aid anybody that he has confidence in on that point.

(Discussion as to interpreter off the record.)

Mr. KING.—You may try it and see if you can make it clear.

Mr. SNOW.—Interrupted for cross-examination.

Mr. KING.—It is stipulated cross-examining at this time is not to prejudice proctor for the respondent's cross-examining later.

Mr. SNOW.—Captain, with what instrument are bearings taken on your ship ordinarily?

A. Ordinarily?

Mr. SNOW.—With the ship's compass or polaris, or—

A. We take bearing by standard compass.

Mr. SNOW.—By standard compass?

A. Yes.

Mr. SNOW.—And is that the compass that the ship is navigated by? A. Yes.

Mr. SNOW.—The same instrument? A. Yes.

(Deposition of S. Sayeki.)

Mr. SNOW.—How do you take a bearing with it?

A. We take a bearing by what we call sight bearing.

Mr. SNOW.—You have a sight bearing?

A. Sight band; we put band on top.

Mr. SNOW.—You put that on top of the compass, do you?

A. Yes, and took bearing.

Mr. SNOW.—And you sight through that?

A. Yes.

Mr. SNOW.—Just like aiming a gun?

A. Yes; and read the point of the compass. That way we do.

Mr. SNOW.—And the direction of the object, by sighting your [453] compass—

A. Yes.

Mr. SNOW.—Your sight band on your object, then looking down to the card of the compass—

A. Yes.

Mr. SNOW.—You can see the bearing of that object on the ship right on your compass, can you?

A. When taking bearing if object is seen.

Mr. SNOW.—If you can see the object?

A. Yes. If you can't see the object I don't take bearing, but on the object which I can see I take my bearing.

Mr. SNOW.—Well, these objects that are noted as bearings having been taken on in this case—

A. Yes.

(Deposition of S. Sayeki.)

Mr. SNOW.—They were all visible objects, were they?

A. Yes, it was visible. The three lights were visible.

Mr. SNOW.—Who took the bearings, Captain? The second mate?

A. And another thing I wanted to take bearing on another light but I could not find out; I could not see it; that is the reason I took only—the second mate took on the three lights.

Mr. SNOW.—He took on the three lights?

A. Yes.

Mr. SNOW.—That he could see?

A. Yes.

Mr. SNOW.—Now, Captain, that was done by the second mate?

A. Yes.

Mr. SNOW.—And then he jotted down—

A. Yes.

Mr. SNOW.—On a piece of paper—

A. Yes. [454]

Mr. SNOW.—The three bearings?

A. Yes.

Mr. SNOW.—And the second mate then wrote from that piece of paper into the rough log those bearings, did he?

A. No. First time he took the bearing and put it in position in chart; then he showed it to me, so I examined that bearing and I said, “This is all right.”

(Deposition of S. Sayeki.)

Mr. SNOW.—I see. Now, you examined the chart, did you?

A. Yes.

Mr. SNOW.—Now, did you actually look through the sight band yourself?

A. No, no. I don't see bearing, but I can trust second mate all right.

Mr. SNOW.—Yes; you are satisfied that he took them correctly?

A. Yes.

Mr. SNOW.—And all you saw was the written notation made by him of the bearings he had taken?

A. Yes.

Mr. SNOW.—Is that right?

A. Yes.

Mr. SNOW.—And then you yourself platted those bearings on the chart?

A. Yes.

Mr. SNOW.—To show where your position was, did you?

A. Yes, yes.

Mr. SNOW.—Or did he do that? He did it first, did he?

A. Yes, he did it first, and I examined that bearing was correct or not.

Mr. SNOW.—And you saw that he drew the correct lines on the chart, did you? [455]

Mr. SNOW.—I think that explains the whole thing, and the captain obviously can't testify that the bearings are correct, except on hearsay.

(Deposition of S. Sayeki.)

Mr. KING.—No, he can't testify as to the readings, but he can testify as to the examination he read on the plat to see whether the bearings would fit the plat. In other words, they might have such bearings as they would not fit the plat; they would be at too broad an angle; I mean the lights would be such that angles would not fit. Ask him about that.

Mr. SNOW.—I will come back to that in a moment. I will ask you one more question: This compass you speak of that the bearings were taken from is in the pilot-house, is it not?

A. Yes.

Mr. SNOW.—And the second mate took the bearings shortly after you came to an anchor?

A. No; he took bearings after I finished with the engine.

Mr. SNOW.—After you had finished with the engine?

A. With the engine.

Mr. SNOW.—And you were finished with the engine shortly after the anchor was dropped?

A. Yes.

Mr. SNOW.—The starboard anchor?

A. Yes.

Mr. SNOW.—Had you swung down with the current so that your anchor chain was taut at the time the bearings were taken?

A. No. At that time when I swung and come steady, steady to the stream, then he took the bearings

(Deposition of S. Sayeki.)

Mr. SNOW.—When your anchor chain was hanging straight down then, was it? [456]

A. No, no; no, no.

Mr. SNOW.—Instead of reaching out?

A. No, no.

Mr. SNOW.—Instead of leading out?

A. No. When we dropped the anchor current was going down.

Mr. SNOW.—Downstream?

A. So (witness illustrates).

Mr. SNOW.—Was your bow upstream when you dropped the anchor?

A. Yes. Swing the ship around to head upstream.

Mr. SNOW.—Head upstream?

A. Yes, head upstream, and drop the anchor; when it comes chain tight and steady, he took the bearings.

Mr. SNOW.—Then you were finished with the engines?

A. Yes, finished with the engines.

Mr. SNOW.—And he took the bearings?

A. Yes.

Mr. SNOW.—Now, were you in the pilot-house when he took the bearings?

A. No. When finish with the engines I and the pilot went down to the chart-room and to my room.

Mr. SNOW.—To the chart-room and to your room?

A. Yes.

Mr. SNOW.—And your room is below the pilot-house, I take it, Captain, on the main deck?

(Deposition of S. Sayeki.)

A. Yes.

Mr. SNOW.—What is the chart-room?

A. The chart-room is in front of my room.

Mr. SNOW.—In front of your room?

A. Yes.

Mr. SNOW.—It is below the pilot-house? [457]

A. Yes, just below the pilot-house.

Mr. SNOW.—And you and the pilot were either in your room or the chart-room?

A. Yes, sir.

Mr. SNOW.—At the time the second mate was taking the bearings; is that right?

A. Beg pardon?

Mr. SNOW.—You and the pilot, I understand, were either in your room or the chart-room?

A. Yes.

Mr. SNOW.—While the second mate was taking the bearings?

A. Yes, yes; that is right.

Mr. SNOW.—That is correct?

A. That is right.

Mr. SNOW.—And who was in the pilot-house with him when he was taking those bearings?

A. The second mate and the third mate also.

Mr. SNOW.—The third mate also?

A. Yes.

Mr. SNOW.—The third mate and the second mate?

A. Were on the bridge.

Mr. SNOW.—Were on the bridge when the bearings were taken?

(Deposition of S. Sayeki.)

A. Oh, when this anchorage bearing was taken by second mate, at that time two officers were on upper bridge. I believe so.

Mr. SNOW.—Now, Captain, when he reports that a certain light bore in a certain direction from the ship—

A. Yes.

Mr. SNOW.—You don't know of your own knowledge, do you, that the light he was looking at was the light he described in the bearing? [458]

A. I beg pardon?

Mr. SNOW.—For instance, suppose the second mate wrote down as one of his bearings that the upper Columbia River—the rear Columbia River range light bore in a certain direction from the vessel.

A. Yes.

Mr. SNOW.—I don't know that he did that, but let's suppose that he did. Now the question I want to ask you is, how would you know that he was looking at the right light when he took that bearing?

A. Well, I can trust the second mate, so I am satisfied what he reported to me.

Mr. SNOW.—But he is not familiar with the Columbia River particularly, is he?

A. But he can see. He can find out which light has been on the chart.

Mr. SNOW.—But this was at night, wasn't it, Captain?

A. Yes, night, but he can find out.



(Deposition of S. Sayeki.)

Mr. SNOW.—After dark?

A. After dark. But he can find out all right, because we have light lift, so we can see all right; we can find out right away.

Mr. SNOW.—And you think then that he did not make a mistake?

A. No, no.

Mr. SNOW.—But you can't be sure?

A. Yes, I can be. He can take bearings all right, I say.

Mr. SNOW.—Well, I think that explains it, doesn't it?

Mr. KING.—You did very well.

Q. (Mr. KING resuming.) All right; after the bearings were taken and you had examined them, did you go to sleep, or where did you go? Did you lie down? [459]

A. I had some talking with chief mate in his room and came back in my room and slept on sofa.

Q. When did you wake up?

A. When the collision took—when collided by “West Keats” I jumped up outside.

Q. Did that awaken you? A. Yes.

Q. Where did you go?

A. I went out on bridge deck.

Q. Did you see anything?

A. It was so dark I could not see, but I find out the steamer was strike by another steamer.

Q. And did you see the other steamer, the one that struck you?

(Deposition of S. Sayeki.)

A. Yes. When I came out on deck I could not see nothing, so I cross over hatch—

Q. Just a minute now, Captain. Which side did you come out on deck, on starboard or port side?

A. I came out on starboard side.

Q. And you could not see anything?

A. No; so I crossed over the bunker hatch.

Q. Now what deck were you on this time, which deck? A. The bridge deck.

Q. On the bridge deck; and you crossed over the bunker hatch?

A. Yes, crossed over the bunker hatch and went to port side of the bridge deck.

Q. Went to the port side of the bridge deck; and what did you see then?

A. And I saw one steamer is going down.

Q. You saw a steamer going down river?

A. Yes. [460]

Q. How far away was she from the stern of your ship then?

A. About a hundred or two hundred feet; one hundred feet or a hundred yards—no; more than that, maybe. Well, I am not sure; I can't tell you exactly how far it was, but—

Q. Well, just about how far?

A. About a hundred feet—a hundred yards.

Q. One hundred yards away? A. Yes.

Q. Now where was that other steamer with reference to the Oregon shore from your ship? Which direction was she? Was she nearer the Oregon shore? A. Yes.

(Deposition of S. Sayeki.)

Q. Or further away from the Oregon shore than your ship was? A. Nearer the Oregon shore.

Q. Nearer the Oregon shore? A. Yes.

Q. How much nearer the Oregon shore? About how much, if you can't tell exactly?

A. About, I said, one hundred yards.

Q. About one hundred yards nearer? A. Yes.

Q. And how much further down the stream was she than your ship at that time?

A. Beg pardon, sir?

Q. At the time you saw this other steamer, which turned out to be the "West Keats," was she downstream from your boat, had she gone down the river any, when you first caught sight of her?

A. She was going down.

Q. Yes; she was going down the river?

A. Yes. [461]

Q. Now, was she just even with your boat, or had she gone further down the river, past your boat?

A. Past my ship going down, sir.

Q. Well, how much had she gone down, how many feet had she gone by your ship?

A. About one hundred yards, sir.

Q. About one hundred yards down the river and one hundred yards toward the shore, too?

A. Yes.

Q. You think she was three hundred feet closer to the Oregon shore than the stern of your vessel; is that right, when you saw her?

A. Beg pardon?

(Deposition of S. Sayeki.)

Q. You think the "West Keats" was three hundred feet—that is one hundred yards— A. Yes.

Q. Closer to the Oregon shore? A. Yes.

Q. Than the stern of the "Boston Maru"; is that right? A. Yes.

Q. When you saw her? A. Yes.

Q. And she was also about one hundred yards down the Columbia River?

A. When I see "West Keats" first it was on port quarter, sir.

Q. On port quarter?

A. Yes, on port quarter about one hundred yards.

Q. On the port quarter about one hundred yards off. Now did you see her between the "Boston Maru" and the Oregon shore, or where did you see her? A. Beg pardon? [462]

Q. Where did you see the "West Keats"? Was she between your vessel and the Oregon shore?

A. No. I can show you by—

Q. Suppose you were standing on your vessel, Captain, and your vessel had her bow pointed upstream—had her bow upstream against the ordinary current of the river. A. Yes.

Q. On which side would the Oregon shore be, do you know?

Mr. SNOW.—Will you read that?

(Last two questions read.)

Mr. KING.—And you were facing the aft on your ship, you see; you were facing the same way your ship was pointing.

(Deposition of S. Sayeki.)

The WITNESS.—I can't understand.

(Further Questions by Mr. ILLIDGE.)

Q. Captain, when were you awakened by the collision— A. Yes.

Q. Had you disrobed and gone to bed?

A. Beg pardon?

Q. Had you disrobed, undressed? A. Yes.

Q. When you went to sleep on the sofa before the collision did you undress, or did you have your clothes on?

A. Well, I had the clothes; just only take off the coat and lay down on sofa.

Q. Just had taken off your coat? A. Yes.

Q. What awakened you?

A. Collision happening.

Q. What did it do to you when the collision happened?

A. Well, the ship is rolled to port side. [463]

Q. About how much do you think, or if you know,—did it roll to the port side?

A. About one point or more, sir.

Q. How much is a point or more? How much is a point? A. A point is eleven degrees.

Q. Eleven degrees? A. Yes.

Q. She listed to port about eleven degrees?

A. Yes.

Q. Did she list enough to throw you off of the sofa or not? A. I fell down on the floor, sir.

Q. You fell down on the floor?

A. Yes, sir, on the floor.

Q. And then you rushed out? A. Yes.

(Deposition of S. Sayeki.)

Q. You rushed out first on the starboard side?

A. Yes.

Q. You saw nothing? A. No.

Q. Now when you rushed out at that time which way did the bow of your boat point? Did it point upstream or downstream, do you know?

A. Oh, I see. The ship was headed down.

Q. The ship was headed downstream? A. Yes.

Q. And you went out on the starboard side; then when you ran out what shore would be off the starboard side?

A. When I came out I can see the ship is moving that way (witness illustrates), so.

Q. Now, what do you mean by that? Do you mean that the stern is [464] swinging around to port?

A. Swinging to—the stern is swinging to down, sir.

Q. Which side, to port or starboard?

A. To port side, sir.

Q. Swinging to port. Now, when you went out of your cabin on the bridge deck on starboard side, do you know would the State of Washington be off that side or would the State of Oregon be off that side? A. Oregon side.

Q. Do you know that the Columbia River divides Oregon and Washington? A. Yes.

Q. Now which side of your ship was on the—

A. Oregon side.

Q. Well, the Oregon side was on which side of your ship?

(Deposition of S. Sayeki.)

A. When I came out the ship is moving, but when I could notice the Oregon side is right aft; about right off that way all over, you see, I can see shore all over aft.

Q. Well, do I understand that the Oregon shore was astern of your ship? Is that what you are trying to tell me? A. Yes.

Q. The Oregon shore was astern of your ship?

A. Yes.

Q. Now, when you went out and you looked over the starboard side and saw nothing, then you crossed over to the port side? A. Yes.

Q. If I understand you, you saw then the "West Keats," or the boat that turned out to be the "West Keats"? A. Yes.

Q. Now, what part of the "West Keats" was near or opposite the bow of the "Boston Maru" when you first saw the "West Keats"? [465]

A. "West Keats" was going down that way, and the ship was heading that way (witness illustrating).

Mr. KING.—That doesn't indicate anything in the record.

Mr. ILLIDGE.—No, that doesn't indicate anything in the record.

Q. Can you tell me, was any part of the "West Keats" to your stern?

A. "West Keats," I could see the after part of the "West Keats" first.

Q. The after part of the "West Keats"?

A. Yes.

(Deposition of S. Sayeki.)

Q. Was opposite what part of the "Boston Maru"? A. On port quarter.

Q. Off the port quarter? A. Yes.

Q. Now, the port quarter is what part of the ship?

A. The port quarter means—

Q. Does the port quarter begin at amidships?

A. Begin from aft—from beam to aft—to right aft.

Q. You mean directly aft. Do I understand the port quarter begins from amidships and extends back to the center of the stern? A. Yes, sir.

Q. That is the port quarter. A. Yes.

Q. Then I understand when you rushed over to the port side after the collision, the stern of the "West Keats," or the after quarter, was it, of the "West Keats"? A. Yes.

Q. Was opposite your port quarter? A. Yes.

Q. And now the "West Keats" at that time was about how far away [466] from the "Boston Maru"? A. From my place—

Q. About how many feet distance between the stern of the "West Keats" and the stern of the "Boston Maru"?

A. About one hundred yards, sir.

Q. About one hundred yards?

A. Yes, or more. No less than one hundred yards, sir.

Q. Would the "West Keats" at that time, then, be between your stern and the Oregon shore?

A. Beg pardon?



(Deposition of S. Sayeki.)

Q. At that time, then, would the "West Keats" be between your stern, the stern of the "Boston Maru," and the Oregon shore. Do you understand what I mean by "between"?

A. Between? What you say?

Q. Do you understand what I mean by "between"?

A. Yes, I understand between. Between—I could see—here is Oregon, and my steamer was here (illustrating); then I can see steamer between here, sir, between Oregon and our steamer, going down.

Q. Now after the collision, after you saw the "West Keats," what did she do? Did she stop or did she keep on going down the river?

A. She keep on going down, sir.

Q. She kept on going down the river?

A. Yes. So I called the second mate to call up that steamer by signal.

A. Oh, you signaled?

A. Yes, by electric light—by electric light—by Morse signal.

Q. By Morse signal?

A. Yes; but she don't answer.

Q. She didn't answer the signal? [467]

A. No.

Q. Is that by wireless or by waving a light?

A. It is by electric light.

Q. Well, how far down the river did the "West Keats" go.

A. I could not see, because it was dark. I could not see the steamer.

(Deposition of S. Sayeki.)

Q. Did she go down out of sight?

A. She went down far away, about one miles or two miles more, sir. Anyway, when I came out on deck I waked up—the deck was lighted so we could not see far away. If it is dark on deck I can see more, but when I came out it is lighted by electric, so I can't see far away.

Q. If I understand you right, you lighted your electric lights on your boat?

A. Yes, so I could not see far away.

Q. All right; you could not see far away because you lighted the electric lights on your own boat?

A. Yes.

Q. Well, then, before you lighted these electric lights what lights were burning?

A. Beg pardon?

Q. Before you lighted the electric lights after the collision what lights were burning?

A. We kept on electric light right through all the time.

Q. Before the collision what lights were burning?

A. Electric lights, sir.

Q. Did you have any kind of signal lights burning? A. No.

Q. Before the collision did you have any signal lights burning when you were lying at anchor?  
[468]

A. No; I don't see any signal lights at all.

Q. I don't mean on the "West Keats." Did you have you anchored lights burning? A. Yes, sir.

Q. Before the collision?

(Deposition of S. Sayeki.)

A. Yes, sir; of course, sir.

Q. Were they burning after the collision?

A. Burning also after the collision.

Q. Both fore and aft?

A. Yes, both fore and aft, sir.

Q. And were they the only lights burning until you had the other lights turned on after the collision? A. Beg pardon?

Q. Were the anchor lights the only lights burning— A. Yes.

Q. Up until and after the collision? A. Yes.

Q. Until you had all the other lights turned on, the deck lights?

Mr. KING.—He says he kept his electric lights on.

Q. (By Mr. ILLIDGE.) Did you turn on some electric lights after the accident, after the collision?

A. No; I didn't touch the electric lights at all, but when I hove up anchor I took down the anchor lights; that is all; and showed the navigation lights.

Q. Well, what do you mean by showing the navigation lights?

A. That means navigating, steaming on. After I hove up anchor we saw—

Q. After you hove up anchor? A. Yes.

Q. Oh, well, we are still anchored. We haven't hove up anchor [469] yet. A. I see.

Q. I am talking about while you lay at anchor.

A. Oh, I see, sir. Well, we don't turn on nothing—just the two anchor lights, sir.

Q. Just the two anchor lights? A. Yes, sir.

(Deposition of S. Sayeki.)

Q. Now, what part of the "Boston Maru" had the "West Keats" struck?

A. The starboard right aft, sir.

Q. What part of your ship, Captain, was struck by the "West Keats"? A. Starboard aft, sir.

Q. Starboard aft? A. Yes.

Q. And did the "West Keats" ever come back again? A. Yes, she come back again.

Q. About how long after the collision?

A. Twenty minutes or a half an hour; about half an hour, I expect.

Q. About a half an hour after the collision?

A. Yes.

Q. And when she came back how was the "Boston Maru" headed then?

A. That time ship was headed down, sir.

Q. Bow downstream? If I understand you, bow downstream; is that right?

A. Yes, head downstream.

Q. How was the tide at that time?

A. The tide was flood tide, sir.

Q. Flood tide? A. Yes.

Q. Now, which side of the "Boston Maru" did the "West Keats" pass [470] on?

A. On the starboard side, sir.

Q. On the starboard side. When the "West Keats" came back after the collision which side of your ship, the "Boston Maru," did the "West Keats" pass on? A. On the starboard side, sir.

Q. What shore would be on the starboard side of the "Boston Maru"?

(Deposition of S. Sayeki.)

A. The Washington side, sir.

Q. The "West Keats" then come back past on the Washington side of your ship? A. Yes, sir.

Q. And about how far off starboard side of your ship did she pass? How close did she come to the "Boston Maru"? A. About one hundred feet, sir.

Q. Then coming back upstream after the collision— A. Yes.

Q. The "West Keats" passed on the Washington side of the "Boston Maru"— A. Yes.

Q. At a distance of about one hundred feet?

A. Yes, sir.

(Further Questions by Mr. KING.)

Q. Captain, how many tons of coal did it take to steam the vessel, to run her from St. Helens back to Portland?

A. From St. Helens back to Portland, sir?

Q. Yes, after the collision.

A. About eight tons, sir, I expect.

Q. Eight tons? A. Yes.

Q. Only eight tons? [471] A. Yes.

Q. How much coal have you used while you have been in port?

A. In port about three or four tons, sir. If we work for cargo out, we use about three or four tons, sir.

Q. A day, you mean? A. Yes, for a day.

Mr. ILLIDGE.—Captain, you say eight tons; you write that. Did you say eight tons to steam from St. Helens up here to Portland?

A. When I come up, yes, about eight tons, sir.

(Deposition of S. Sayeki.)

Mr. ILLIDGE.—Eight?

A. Yes.

Mr. ILLIDGE.—You write that, will you.

The WITNESS.—Eight tons (writing same).

Q. (By Mr. KING.) And you used three or four tons a day here in Portland? A. Yes.

Q. How many days have you done that?

A. From twenty-seventh up to to-day.

Q. And how many tons have you used altogether then since the time of the accident?

A. About—I think about seventy-five or eighty tons altogether.

Q. Seventy-five or eighty?

A. Yes, up to go down.

Q. Taking you back to St. Helens?

A. To St. Helens.

Q. It will take about eighty tons altogether?

A. Yes, sir.

Q. Where did you buy that coal? Are you taking coal on board here?

A. Yes, we are going to take in coal.

Q. How much do you pay a ton for it? [472]

A. I don't know that.

Q. Who knows that? A. The K Line offices.

Q. The K Line offices will know that? A. Yes.

Q. How many men have you on board your ship?

A. Thirty-nine men, sir.

Q. Do you know what the total pay-roll a month is, how much they pay all the men together each month?

(Deposition of S. Sayeki.)

A. I could not tell you exactly, but about—for wages?

Q. Yes, for wages.

A. About two thousand dollars, sir.

Q. A month?      A. For a month.

Q. And how much does it cost each day to feed the men? How much do you pay for food to eat?

A. For—

Q. Well, for the total, for the whole bunch, how much stores does it take?

A. I can't tell you exactly; I don't know.

Q. Tell me as near as you can about how much a day.      A. About one thousand dollars, sir.

Q. A day?      A. No, no; for months.

Q. Oh, for a month?      A. Yes.

Q. That would be about thirty-seven dollars a day; is that right? Divide a month by thirty, you would get about thirty-three dollars a day, then, cost for food?      A. Yes. [473]

Q. How much does it cost for oil and stuff for the engines each day?      A. I don't know, sir.

Q. You don't know that, eh?      A. No.

Q. The K Line would know that, would it?

A. Yes.

Q. They keep a record of that, do they?

A. Yes, sir; maybe.

Q. You don't know about what the rate of charter and demurrage on your boat is?

A. No, I don't know that.

Q. The K Line know that, do they?      A. Yes.

Q. They have a record of that?      A. Yes.

(Deposition of S. Sayeki.)

Q. After the collision did you have to take off some of your deck-load? A. Yes.

Q. About how many thousand feet of lumber did you have to take off, Captain?

A. I don't know by feet.

Q. How many tons?

A. But they work for certain times. I don't know exactly.

Q. You didn't pay those bills? Did you pay the men to do that, the stevedores?

A. No; the stevedore took some firm, but I don't remember now how much the cost has been.

Q. You don't know. The K Line will know that, will they? A. Yes, the K Line or Suzuki. [474]

Q. Either one or the other will know it?

A. Yes.

Q. Then they had to load that lumber back on board after they finished repairs; they had to put the lumber back again? A. Yes.

Mr. ILLIDGE.—The lumber wasn't loaded yet.

Q. (By Mr. KING.) And the ship was here in port; she had some repairs made to her, didn't she?

A. Yes.

Q. Is she on drydock?

A. No, she is not in drydock.

Q. She is not now, but she was, wasn't she? When she came up here didn't she go in drydock?

A. No, we don't go in the drydock at all.

Mr. ILLIDGE.—Just alongside?

A. Just alongside.

Q. (By Mr. KING.) Oh, just alongside?



(Deposition of S. Sayeki.)

A. Yes.

Q. Made repairs alongside? A. Yes.

Q. When you came back up the river, Captain, from St. Helens, after the accident, did you have a pilot on board? A. Yes, sir.

Q. And when you moved about the harbor here to get repairs and unload the lumber, did you use a pilot? A. Yes, right through.

Q. And a tugboat? A. And tugboats, sir.

Q. Did you pay those bills? A. Yes. [475]

Q. You did? A. Yes.

Q. Have you got receipts for those?

A. No, I don't have them with me, but they might be—

Mr. ILLIDGE.—Won't Suzuki pay these bills? Do they know about the tug boats, and the pilot charges?

A. Yes; all paid by Suzuki Company, not K Line. Part of this is paid by the K Line also.

Mr. KING.—You may cross-examine.

Cross-examination by Mr. SNOW.

Q. Now, you dropped the anchors about eight-ten P. M., Captain? A. Eight-thirty P. M.

Q. Eight-thirty off the Columbia City lights?

A. Yes.

Q. Did you see the Columbia City lights when you dropped the anchor? A. The Columbia City?

Q. Range lights? A. Yes.

Q. Can you see them from straight out in the stream?

(Deposition of S. Sayeki.)

A. Yes, I could see all right, only one light. On the Oregon side I could see only two lights.

Q. Only two lights on the Oregon side?

A. Yes.

Q. Do you know which ones these were?

A. Yes; we took the bearings. Another two lights I could not see.

Q. It was dark then, wasn't it?

A. No; shaded by trees, sir. [476]

Q. The lights were shaded by trees?

A. Yes, shaded by trees, so I could not see another two lights, but two lights I could see.

Q. Now, you came downstream before you anchored? A. Yes.

Q. And swung the ship around with her head upstream? A. Yes.

Q. Which way did she swing, to port or to starboard? A. To starboard.

Q. To starboard? A. Yes.

Q. Then you came down near the Oregon shore, did you?

A. No. Well, we came down around—we came down around Oregon side and swing the ship.

Q. Out toward the Washington side?

A. Yes, out to the Washington side, and came up to up head and dropped the anchor.

Q. Then you swung the ship? A. Yes.

Q. At a point below where you actually dropped the anchor, I suppose? A. Beg pardon, sir?

Q. You went upstream a little bit after you got the ship swung around entirely, did you?

(Deposition of S. Sayeki.)

A. Well, that time it was slow speed, so the current was going down? A. Downstream?

A. So ship was not going up; maybe stopped in one place.

Q. Stopped in one place?

A. Yes; because water is coming down. [477]

Q. Were you stopped at the time you dropped the anchor? A. Beg pardon?

Q. Were you stopped at the time you dropped the anchor? Were you at a stop, were you standing still, at the time you dropped the anchor?

A. Yes, the time I dropped the anchor.

Q. And I suppose your engine was going slow ahead, was it? A. At that time?

Q. Yes.

A. Yes, going slow and just engine slow ahead and slow astern sometimes; I don't know exactly; many times we use the engines, stop and slow.

Q. When you were coming to an anchor you were under varying bells, were you? A. Beg pardon?

Q. You were under varying bells and different speeds? A. Yes, different speeds.

Q. And you let go the starboard anchor, did you?

A. Yes, sir.

Q. How many feet of chain; how many fathoms of chain, I should say? A. Thirty fathom.

Q. Thirty fathoms?

A. Yes; pay out thirty fathoms of chain; that is two shackles on deck.

Q. Now, how long was it after you dropped that

(Deposition of S. Sayeki.)

anchor that you and the pilot went downstairs to your room? A. Beg pardon?

Q. How long after you dropped anchor was it that you and the pilot went downstairs, went down to your room in the chart-room?

A. After I finished the engine I came down to the chart-room, so— [478]

Q. Was that when you left the second mate to take the bearings?

A. The second mate took the bearings after finished with the engines, see?

Q. After you finished with the engines?

A. Yes; so at the same time I went down. I ordered the second mate to take cross-bearing of those three lights and I went down to chart-room and my room.

Q. Did you use the engines any after you had dropped the anchor?

A. I don't remember exactly, but I don't think we used the engine. I don't remember, exactly. We stopped the engines and when the ship comes stop, drop the anchor, I expect; I don't know exactly.

Q. I see you don't remember exactly?

A. No, no.

Q. You were in the pilot-house while the pilot was bringing the vessel to an anchorage, weren't you? A. Yes.

Q. You were in the pilot-house or on the bridge?

A. Yes; I was on bridge also.

Q. You have a bridge there on that vessel with

(Deposition of S. Sayeki.)

two wings, have you, extending on either side of the pilot-house?

A. Yes. I was standing on flying bridge. I don't remember which side I was standing on, but I was on upper bridge.

Q. On the upper bridge?

A. Yes, because pilot may give us order to let go anchor or anything else.

Q. And you would have to be there to see that that order was obeyed, would you?

A. Yes, to give the order to the second mate—no, not second mate; I mean for chief mate on fore-castle.

Q. Was the chief mate standing by on the fore-castle head? [479]

A. Yes, for dropping anchor the chief mate was on fore-castle-head.

Q. Did you take any bearings at the time the vessel was coming to her anchorage ground?

A. No; I don't taken anything at all; just I was on bridge, that is all.

Q. Do you know whether the pilot took any bearings?

A. I don't remember. I don't remember. He might. He was looking for shore, but I don't know if he took the bearings himself or not. I don't remember. He was watching the shore all right, I know.

Q. He was watching the shore, was he?

A. Yes.

Q. Which shore, the Oregon or Washington?

(Deposition of S. Sayeki.)

A. On both sides.

Q. Is the pilot-house on the same level as the bridge? A. Yes.

Q. So the bridge extends on either side of the pilot-house, does it?

A. Yes. I think so, but I don't understand pilot-house. I don't use generally pilot-house, but I think you mean the pilot-house is upper bridge.

Q. You think what?

Mr. KING.—Think you mean upper bridge.

The WITNESS.—Yes, I think you mean upper bridge.

Q. (By Mr. SNOW.) What I mean by the pilot-house is the house where the wheel is.

A. Yes; yes.

Q. For steering? A. That is right.

Q. Is that what you call the upper bridge? [480]

A. Yes, that is what we call the upper bridge.

Q. Is that below or above the bridge on which you were? A. Yes—beg pardon?

Q. Is that above the bridge where you were?

A. Yes.

Q. Or on a level? A. Yes.

Q. Were you in the pilot-house at that time?

A. No, no. I was at that time in upper bridge.

Q. Oh, and the pilot was up there too, was he?

A. Yes.

Q. Who had charge of the setting of your riding lights after you came to an anchor?

A. Beg pardon?

Q. Who took charge of setting your riding lights

(Deposition of S. Sayeki.)

after you came to an anchor? Do I make myself clear, Captain? A. Beg pardon?

Q. Do I make myself clear?

A. No, I could not understand what you say.

Q. A while ago you talked about your lights, one being in the fore rigging; I believe you said, and one in the jackstaff aft?

A. Yes, sir, that is right.

Q. Who set those lights?

A. That is one of the sailors.

Q. One of the sailors?

A. Yes; perhaps storekeeper.

Q. Under whose direction; one of the mates'?

A. Well, this was given by the chief mate's orders.

Q. You say the orders were given by the chief mate? A. Yes, by chief mate. [481]

Q. Did you see those lights set yourself, Captain?

A. Of course everybody know that we must put anchor light when we drop the anchor, so he might give the order or might not. You know, whether he give the order or not, sailors would put it up right away.

Q. They know enough to put them up without orders?

A. Yes. They are familiar with that rule to hoist that anchor light.

Q. They are familiar with that regulation?

A. Yes, with that regulation.

(Deposition of S. Sayeki.)

Q. Do you have the same anchor lights in Japanese waters? A. Yes, all over the world, sir.

Q. All over the world? A. Yes.

Q. The same lights and the same heights from deck, are they? A. Yes, sir.

Q. And the same places? A. Yes.

Q. Did you see those lights yourself?

A. Yes; I see the lights all right.

Q. You said one of them was in the fore rigging?

A. Forestay.

Q. On the foremast? A. On the forestay.

Q. On the forestay?

A. Yes, on the forestay.

Q. And about how high from the deck was that?

A. About thirty-seven feet, or thirty-six or seven feet; I don't know exactly; perhaps thirty-seven or six.

Q. And the other, you say, was on the jackstaff aft? [482] A. On the flagstaff aft.

Q. On the flagstaff aft? A. Yes.

Q. Are you sure it was there and not in the main rigging? A. No.

Q. It wasn't in the main rigging? A. No.

Q. You are sure of that?

A. I didn't see any light on the main rigging.

Q. You saw the riding lights yourself, did you, after they were put up?

A. No, I don't see any light on riggings.

Mr. KING.—He didn't set any on riggings. He doesn't understand you, Mac.



(Deposition of S. Sayeki.)

Q. (By Mr. SNOW.) Did you see the lights yourself, Captain, after they were set, those riding lights? Did you see them with your own eyes?

A. Yes; I could see two anchor lights, one on forestay and one for after flagstaff but not on riggings.

Q. Not in the main rigging?

A. No. Riggings mean mainmast side of stay. I don't have any light on rigging.

Q. This light on the forestay was on one of these stays on the foremast, was it? A. Yes.

Q. And there wasn't any light on the stays on the mainmast? A. No.

Q. Or any other mast? A. No.

Q. And this flagstaff aft is just a short mast, isn't it? [483] A. Yes.

Q. How high is it?

A. About twenty feet long, I expect, but when they hoist it up the anchor light was about seventeen feet or sixteen feet high from poop-deck.

Q. Do they hoist that with a little block and tackle? A. Yes.

Q. Lash it there, do they? A. Beg pardon?

Q. Do they lash it there? Do they tie it there?

A. Yes.

Q. Make it fast? A. Yes, make fast.

Q. What other lights were there on deck now, Captain, at the time of the collision?

A. On deck at that time of collision? Well, maybe electric deck light.

(Deposition of S. Sayeki.)

Q. Did you have a cluster on, cargo cluster? Do you know what I mean by a cargo cluster?

A. Yes.

Q. That is a group of lights, a cluster of lights.

A. No.

Q. That you used to work cargo with at night?

A. No, no.

Q. You didn't have anything like that on?

A. No.

Q. What other lights did you have on deck, or do you know?

A. We have only fixed the lights on deck, sir.

Q. What lights are they?

A. We call generally bulkhead lights. [484]

Q. Bulkhead lights?

A. The overhead deck light, just like this (pointing to light in ceiling of room); the light on deck.

Q. What are those lights for, Captain?

A. For everybody to walk and to see on deck well.

Q. To light up the deck?

A. Yes, sir, to light up the deck.

Q. And how many of those are there?

A. About twenty of those deck lights.

Q. Twenty of them?

A. Yes, about twenty, I expect.

Q. About twenty. Do they light up pretty much of the whole main deck?

A. No; main deck, all main deck is loaded with lumber.

Q. You had a deck-load on the main deck?

A. Yes, sir.

(Deposition of S. Sayeki.)

Q. That is what you call the well deck; is that it?

A. Yes, sir, that is right.

Q. Those lights were not to light up the well deck, then? A. No.

Q. They were to light up the bridge deck?

A. Yes, only bridge deck.

Q. Were there twenty of them around there?

A. Yes, about twenty; I think about twenty lights.

Q. You don't remember having any cluster of lights, any cargo cluster, then, do you?

A. I don't remember.

Q. Of course you went to sleep along about nine o'clock, did you? A. Yes, sir.

Q. So you didn't know what there was on deck after that, did you? [485]

A. No, I don't know after that.

Q. So you don't know what lights were burning and what were not after that, from seeing them with your own eyes?

A. Of course, I put on officer and one quartermaster on deck for anchor watch, so if he does not call me up I think everything is going on all right, I believe.

Q. Now, who went on watch first?

A. On first the third mate.

Q. The second mate? A. The third mate.

Q. The third mate, and one of the quartermasters? A. And one of the quartermasters.

Q. And what was that quartermaster's name, do you know? A. I don't know his name.

(Deposition of S. Sayeki.)

Q. That was the third mate stood the first watch?

A. Yes.

Q. Up until twelve o'clock?

A. Yes, up until twelve o'clock.

Q. And who relieved him at twelve o'clock?

A. Second mate relieved him.

Q. And do you know the name of the quartermaster that relieved the quartermaster watch at twelve o'clock?

A. I don't know. Just man who came up here.

Q. One of the men who have been brought here as a witness, was it? A. Yes.

Q. That is the man? A. That is the man.

Q. Do you recognize him? [486]

A. Yes. I just joined this ship before leaving Japan, you see, so I don't know everybody's name.

Q. I see. You went to sleep on the sofa in saloon, didn't you? A. No; in my room.

Q. In your room? A. Yes.

Q. And the collision woke you up? A. Yes.

Q. And you went on deck then? A. Yes.

Q. On the starboard side?

A. On the starboard side on bridge deck.

Q. Bridge deck, starboard side? A. Yes.

Q. And your room opens on to the bridge deck, does it? A. Yes.

Q. Starboard side?

A. Yes, sir. My room is on lower bridge.

Q. On the lower bridge? A. Yes, sir.

Q. I see. Now, when you went out on the starboard side of the bridge deck what did you see?

(Deposition of S. Sayeki.)

A. I could not see nothing.

Q. You could not see anything at all?

A. No, but I take notice; I find out the steamer strike. Somebody shouting, you see.

Q. Somebody shouting?

A. Somebody shouting steamer striking, so I take notice for anchor light fore and aft, and came out to port side of the bridge deck. [487]

Q. Did you look at your anchor lights fore and aft? A. Yes.

Q. Where were you standing when you looked at your anchor lights?

A. Anchor lights were burning, sir.

Q. They were burning, were they? A. Yes.

Q. Where were you when you looked at them?

A. Beg pardon?

Q. Where were you when you looked at the anchor lights? A. On bridge deck.

Q. On which side? A. On starboard side.

Q. That is when you first came out of your room?

A. Yes, yes.

Q. That was the first thing you did, to look at your anchor lights, was it?

A. Yes; and look at the anchor lights first.

Q. You did what?

A. Look at the anchor lights first when I came out on deck.

Q. Then you say you could not see anything from the starboard side of the deck? A. No.

Q. You could not see any lights?

A. No, I could not see any light on starboard side.

(Deposition of S. Sayeki.)

Q. Could you see the shore?

A. Well, I could see a black line.

Q. Black line?      A. Yes.

Q. An outline of the shore?

A. Yes; I could see the shade of the shore. [488]

Q. What shore was that, do you know, Captain?

A. I think it was Oregon shore.

Q. I take it it wasn't—

A. And also at that time I can find out the ship is moving, ship's stern is moving down by impact.

Q. The ship's stern was moving down the stream by the impact, was it?      A. Yes, impact.

Q. Could you tell how fast it was moving downstream?

A. No, I could not tell you exactly.

Q. She was swinging, was she, with the impact?

A. Yes; she was moving easily.

Q. Just slowly?      A. Yes.

Q. She was on an even keel, of course, by that time, was she?

A. No; she was by the stern.

Q. She was by that time?      A. Yes.

Q. By the time you got out there?

A. My steamer was by the stern?

Q. By the stern?      A. Yes.

Q. What do you mean?

A. She is not even keel.

Q. She was not on an even keel?      A. No.

MR. KING.—He means fore and aft.

The WITNESS.—Fore and aft.

(Deposition of S. Sayeki.)

Q. (By Mr. SNOW.) Oh, she had more cargo—how much by the stern was she? [489]

A. About three or four feet, I expect.

Q. Oh, she was? A. Yes.

Q. What was her draft forward?

A. Fore twenty-four feet and a little bit; I don't remember; and aft it was twenty-six one.

Q. Twenty-six one was your deepest draft?

A. Yes.

Q. And that was aft? A. Yes, that was aft.

Q. And your draft forward was considerably less, then? A. Yes.

Q. Three or four feet less?

A. Yes; about twenty-four feet, but not less than twenty-four feet.

Q. Not less than twenty-four feet? A. Yes.

Q. I see. When you were standing on the bridge deck starboard could you see what you call the shade or shadow of the land amidships or to your stern? A. On stern, sir.

Q. Toward the stern?

A. Right through on the after.

Q. On the after end? A. Yes.

Q. And you were looking out toward the aft then when you saw the shadow of the land?

A. Beg pardon?

Q. You were looking out toward the after end?

A. Yes.

Q. On the port quarter when you saw—off the starboard quarter [490] when you saw the shadow of the land?

(Deposition of S. Sayeki.)

A. Yes, from starboard quarter to the right aft, all over. When I came out on port I could see Oregon shore also.

Q. When you were on the port side you could see the Oregon shore also? A. Yes.

Q. Looking aft, then, or off the port quarter?

A. From right through, sir—from right aft on port.

Q. On toward the port? A. Yes.

Q. I see. You could see the Oregon shore from both the starboard and port sides of the bridge deck? A. Yes.

Q. If you looked aft; is that correct?

A. Beg pardon?

Q. By looking aft? A. Yes.

Q. From either the starboard or port side of the bridge-deck— A. Yes.

Q. You could see the Oregon shore? A. Yes.

Q. That is correct, is it?

A. Yes; and the ship was moving down.

Q. And the ship was moving downstream?

A. Yes.

Q. And she was about, you think, three hundred yards away when you first came on deck, do you or when you got over on the port side? A. Yes.

Q. After a while she came back, didn't she?

A. Beg pardon? [491]

Q. You testified that after a while she came back?

A. Yes.

Q. The "West Keats"?

A. Yes, the "West Keats" come.



(Deposition of S. Sayeki.)

Q. Along about twenty minutes or a half hour, you say?

A. Yes, about a half hour later the "West Keats" came up again.

Q. What did you do with the "Boston Maru" between the time of the collision and the time the "West Keats" came back?

A. I was inspecting the damaged part.

Q. Did you inspect that yourself? A. Yes.

Q. You went aft yourself and saw it, did you?

A. Yes, yes; and I see—I inspected the steering gear also.

Q. The steering gear? A. Yes, sir.

Q. How did you find the steering gear?

A. It was jammed; the steering gear rudder could not move.

Q. It was jammed, was it?

A. Yes, it was jammed.

Q. You had to make temporary repairs before you could make your berth the next morning, didn't you? A. Yes, sir.

Q. Were you doing anything else during that time, between the time of the collision and the time the "West Keats" came back?

A. And also I gave the second mate—I gave order to second mate to make Morse signals for the "West Keats," and the second mate and the operator called up "West Keats" by signal, but she went on, sir.

Mr. SNOW.—I move to strike that, because it is hearsay,

Q. Did the "Boston Maru" turn any between the

(Deposition of S. Sayeki.)

time of the collision [492] and the time the "West Keats" came back? Did she turn in the river?

A. Yes; she—at that time the ship came back to head down again. The ship was moving down by impact, but after that she came back.

Q. She came back?

A. Yes, came back to head down.

Q. To head clear downstream?

A. Yes, sir; just right parallel to the shore.

Q. Parallel to the shore? A. Yes.

Q. With her head downstream?

A. Yes, sir, with her head downstream.

Q. Which way did she swing back? Did her stern swing toward the Oregon shore when she came back?

A. Yes, sir; stern was swinging back to Oregon side.

Q. Then the stern went right upstream?

A. Yes, right upstream.

Q. And then her head was downstream?

A. Yes.

Q. And was her head downstream when the "West Keats" came back? A. Yes.

Q. And which side of you did the "West Keats" come, the starboard or port?

A. On starboard side she passed.

Q. How far away?

A. About one hundred feet, I expect.

Q. You saw her quite plainly, I suppose?

A. Yes, yes.

Q. Did she hail you? A. Beg pardon? [493]

(Deposition of S. Sayeki.)

Q. Did she hail you? Did anybody shout from the "West Keats" to your vessel?

A. Yes, yes. I don't know; maybe the pilot or somebody else shouted.

Q. Who answered that from your vessel?

A. The pilot answered.

Q. The pilot, Captain Gildez? A. Yes.

Q. That conversation was in English, I suppose, wasn't it? A. Yes, yes.

Q. You understood all of it, I suppose, didn't you, or nearly all of it?

A. Some of it I could understand, but the pilot explained it clearly.

Q. He explained it to you?

A. Yes; that the steamer is going back to Portland, he said.

Q. And he explained that they asked you what your damage was, and whether you were damaged below the water-line, didn't he?

Mr. KING.—I object to that.

Mr. SNOW.—All right; I don't insist on that.

Mr. KING.—There is no charge that the "West Keats" ran away.

Q. (By Mr. SNOW.) Then the "West Keats" went upstream, did she? A. Yes, went upstream.

Q. And disappeared? A. Beg pardon?

Q. And disappeared? A. Yes, disappeared.

Q. And you stayed where you were?

A. I was waiting steering gears to be ready.

Q. You were getting the steering gear ready, were you? [494] A. Yes.

(Deposition of S. Sayeki.)

Q. And making the repairs?

A. Yes. They removed the—I don't know what you call the name.

Q. Well, I have forgotten it. I know what you mean.

A. Yes. She take off part of the deck fitting—my crew took off deck fitting; then rudder work all right—not all right, but then rudder work better, and I spoke to the pilot the rudder will not move hard over but she can move about thirty degrees.

Q. Thirty degrees?

A. Yes, from center to one side. So I asked the pilot, 'You can take the ship or not?' And he said, "If we go very slow we can manage all right," he said. Therefore we stand by engine and proceed to St. Helens.

Q. What time was it that you heaved in your anchor to move to St. Helens?

A. If I see the log-book I can tell you, but about three o'clock, I expect.

Q. About three o'clock, you think? A. Yes.

Q. And did you either give out or pay in any anchor chain—pay out or heave in any anchor chain? A. No.

Q. Before that? A. No.

Q. You stayed right exactly at the same place, did you? A. Yes.

Q. From the time of the collision? A. Yes.

Q. Until you moved to St. Helens?

A. Yes, that is right. [495]

(Deposition of S. Sayeki.)

Q. And that was a couple of hours later, I take it? A. Yes.

Q. And during that time you were repairing your steering gear, were you? A. Yes.

Mr. SNOW.—That is all.

Redirect Examination by Mr. KING.

Q. After the collision, Captain, the anchor light on the flagstaff was still burning, was it?

A. Yes, still burning.

Q. That light was placed at the very tip of the flagstaff, or what part was it on?

A. Well, about two or three feet below the flagstaff top.

Mr. KING.—That is all.

And further deponent saith not.

Signature waived.

(At this point a recess was taken until 7:00 o'clock P. M. of this day, Monday, November 10, 1924, at which time, at the same place, proceedings herein were resumed as follows:) [496]

#### STIPULATION RE TESTIMONY OF CAPTAIN S. SAYEKI.

It is stipulated that the captain of the "Boston Maru," S. Sayeki, would testify under oath that the following are the dimensions and measurements of the "Boston Maru"; Standard compass to hawse-pipe horizontal 136 feet; shackle (2 shackle) to hawse-pipe diagonal 21 feet; hawse-pipe to surface of water vertical 16 feet 6 inches; hawse-pipe to stem horizontal 5 feet; that the distance from the

standard compass to the stern horizontal is 259 feet.

Mr. H. S. Toda was produced by proctors for the libelant as an interpreter and was by the notary sworn to truly and correctly translate and interpret all questions propounded to the witnesses from the English language into the Japanese language, and to translate and interpret all answers given by the witnesses from the Japanese language into the English language to the best of his ability.

#### DEPOSITION OF H. YOKOI, FOR LIBELANT.

H. YOKOI was thereupon produced as a witness in behalf of the libelant and, having been sworn through interpreter Toda, to tell the truth, the whole truth and nothing but the truth, the following occurred:

Mr. SNOW.—Before we start I would like to ask the interpreter a few questions.

Interpreter TODA.—Yes.

Mr. SNOW.—Mr. Toda, what is your occupation?

Interpreter TODA.—Merchant or employec of Suzuki & Company. [497]

Mr. SNOW.—You are in the employ of Suzuki & Company?

Interpreter TODA.—Yes, I am. Yes.

Mr. SNOW.—And you live here in Portland?

Interpreter TODA.—Yes, I do.

Mr. SNOW.—And you are in their Portland office, are you?

Interpreter TODA.—Yes.

Mr. SNOW.—You are a Japanese by birth?

Interpreter TODA.—Citizen.

Mr. SNOW.—A Japanese citizen?

Interpreter TODA.—Yes.

Mr. SNOW.—Suzuki & Company is the agent in Portland for the K Line?

Interpreter TODA.—Yes, for the Kokusai Kisen.

Mr. SNOW.—I mean the owner of the “Boston Maru”?

Interpreter TODA.—Yes.

Mr. SNOW.—And so in Portland you represent both the K line and Suzuki & Company?

Interpreter TODA.—Yes.

Mr. KING.—Just a moment. I object to that question, unless you specify whom you mean by “you.”

Mr. SNOW.—I mean by “you,” the interpreter Mr. Toda.

Interpreter TODA.—Oh, I do not represent those people. I am merely an employee of the company which represents them.

Mr. SNOW.—You are employee of Suzuki & Company?

Interpreter TODA.—Yes.

Mr. SNOW.—Which represents the K Line?

Interpreter TODA.—Represents the K Line, yes.

Mr. SNOW.—I desire at this time to object to the appearance of Mr. Toda as an interpreter in the case, on the ground that he is under employment of Suzuki & Company, an agent of the libelant in the

[498] case in which we are taking testimony, and is, therefore, not a disinterested person.

Mr. KING.—It may be stipulated in the record, Mr. Snow, that on or before two o'clock on this date, it now being seven-fifteen P. M., that you were notified of our intention to take the depositions of part of the crew of the "Boston Maru" through an interpreter, Mr. Toda, and were offered the opportunity to have present your own interpreter, if you could produce such interpreter.

Mr. SNOW.—Yes, that may be stipulated.

Mr. KING.—That is the fact, is it not?

Mr. SNOW.—Yes; those statements you have made are correct.

Mr. KING.—And it is further stipulated in the record that the "Boston Maru" is scheduled to sail to-morrow and clear for Australia?

Mr. SNOW.—Yes, those are the facts.

Mr. KING.—And that she is a tramp steamer?

Mr. SNOW.—I don't know whether she is a tramp steamer or not. What is the fact as to that, Mr. Toda.

Interpreter TODA.—I suppose.

Mr. KING.—No regular run, has she?

Interpreter TODA.—I suppose she is a tramp steamer.

Mr. SNOW.—She is a tramp steamer?

Interpreter TODA.—Yes.

Mr. SNOW.—She is not on a regular run between specified ports?



Interpreter TODA.—No, no; especially so in this case, because she is under charter by an American steamship operator for this trip only.

Mr. SNOW.—She is under charter of some American steamship operator, is she?

Interpreter TODA.—Yes, the name of which I don't just recall, [499] just for this trip, I suppose under the definition of a tramp steamer. Of course chartered steamers are, aren't they?

Mr. SNOW.—Yes, I guess so.

Interpreter TODA.—Yes; especially for just one trip.

Mr. KING.—I would like to state into the record at this time that the libelant further renews its offer to have the testimony of these witnesses now to be taken, to be taken through an interpreter furnished by the proctor for the respondent, or through joint interpreters, if any such can be produced.

Mr. SNOW.—Now, may it also be stipulated in the record that from two o'clock on this afternoon we spent the greater part of the time taking the testimony of Captain Sayeki, and that during such intermissions as I was able to make in that testimony I telephoned several times from this office to three or four, I forget which, local Japanese men and endeavored to have one of them appear at the present hearing to aid in interpreting the testimony of the witnesses about to be examined, but was unable to secure the services of any, chiefly because of the lateness of the notice to them, and that I did not receive notice that it would be necessary to have

an interpreter in this testimony until after I arrived at this office this afternoon, which was some time in the neighborhood of two o'clock.

Mr. KING.—Libelant further offers to take this testimony on the succeeding day, if proctor is of the opinion that it is necessary for his protection to postpone the taking of the testimony until that time.

Mr. ILLIDGE.—Can't it also be shown that we wanted to postpone the testimony until to-morrow, and he wanted to take it to-night?

Mr. SNOW.—I am willing to take it now, but I must renew my [500] objections.

Mr. KING.—Well, let's quit, if you are going to insist on that.

Mr. SNOW.—Well, I feel I have to insist on it. I don't like to postpone it.

Mr. KING.—Well then, we will hold the ship here and take the testimony at what hour to-morrow?

Mr. SNOW.—Well, I would have to do some more telephoning and figure out what I can do.

Mr. KING.—Libelant in this connection avers at the present time, so far as information can be obtained, that the ship "Boston Maru" will be ready to sail to-morrow morning, but that the ship will be held in this port for the purpose of taking the testimony to-morrow, or such part of to-morrow as is necessary for said purpose, at the insistence of proctor for respondent. I guess we might as well adjourn.

(Thereupon the taking of depositions herein was adjourned until to-morrow, Tuesday, November 11th, 1924, and at 10:00 A. M. on Tuesday, November 11th, 1924, the notary and the same proctors appeared at the same place above noted, and after some delay Mr. D. Takeoka appeared as an interpreter in behalf of proctor for respondent; thereupon the following proceedings were had:)

Mr. KING.—It is stipulated by and between the proctors for libelant and respondent in this cause, that the plat marked Libelant's Exhibit 2 is a true and correct copy of the plat of the U. S. Engineer's Office for the portion of the Columbia River [501] indicated by the marks and notations on said plat. This stipulation, however, does not cover any lines or marks on said plat at the time the same is offered other than those showing as a part of the blue-print itself. Is that right?

Mr. SNOW.—That is my understanding. I admit the correctness of the chart, and that it is a correct blue-print of the tracing made by the U. S. Engineers, but I do not admit the correctness of the lines which have been drawn thereon evidently to indicate the alleged position of the anchored vessel, the "Boston Maru."

Mr. KING.—Will you please mark this chart now Libelant's Exhibit 2, to identify it.

(Said chart so offered was marked Libelant's Exhibit 2 and is filed herewith as a part of these depositions.)

Mr. KING.—We will now call the second mate.

DEPOSITION OF ISOKICHI CHIGA, FOR  
LIBELANT.

ISOKICHI CHIGA was thereupon produced as a witness in behalf of the libelant and, having been first duly sworn, through Interpreter Toda, to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

## Direct Examination by Mr. KING.

Q. State your name.      A. Isokichi Chiga.

Mr. SNOW.—At this time I desire to renew my objections to Mr. H. S. Toda as interpreter, on the ground that as an employee of Suzuki & Company he is not a disinterested person.

Mr. KING.—The libelant offers to have Mister—

Mr. SNOW.—I might add, Mr. D. Takeoka is present now, at my [502] request, and will act as interpreter, if desired—if consented to by counsel.

Mr. KING.—I might ask whether Mr. D. Takeoka has had any experience in shipping matters.

Mr. D. TAKEOKA.—No.

Mr. KING.—Are you familiar, Mr. Takeoka, with the terms commonly applied to ships as aft, stern, forestay, and terms of that nature?

Mr. TAKEOKA.—I can't.

Mr. KING.—Do you know what the stern quarter of a ship is?

Mr. TAKEOKA.—Stern quarter of a ship? No, I don't.

Mr. KING.—Do you know what the galley of a ship is?

Mr. TAKEOKA.—I do not.

Mr. KING.—Do you know what the flagstaff of a ship is?

Mr. TAKEOKA.—No.

Mr. KING.—Do you know what portion of the ship the flagstaff is located on?

Mr. TAKEOKA.—I do not.

Mr. KING.—Do you know where the ship's compass is usually located, what portion of the ship?

Mr. TAKEOKA.—The compass? I do not.

Mr. KING.—Do you know what is the bridge of a ship?

Mr. TAKEOKA.—The bridge of a ship? No.

Mr. KING.—The bridge-deck? Do you know what the poop-deck of a ship is?

Mr. TAKEOKA.—I don't.

Mr. KING.—Do you know what the bow of a ship is?

Mr. TAKEOKA.—No.

Mr. KING.—Do you know what a magnetic compass is?

Mr. TAKEOKA.—Yes. [503]

Mr. KING.—How does a magnetic compass differ from any other type of compass?

Mr. TAKEOKA.—That is too complicated matter to explain for me.

Mr. KING.—Do you know what starboard is?

Mr. TAKEOKA.—Starboard? No, I don't.

Mr. KING.—Do you know what range light is?

Mr. TAKEOKA.—Range light? No.

Mr. KING.—Do you know what an anchor light is?

Mr. TAKEOKA.—Isn't that two windows where your anchor locates in what you call it—front part of a ship?

Mr. KING.—You mean you think it is the light where the anchor is?

Mr. TAKEOKA.—Yes.

Mr. KING.—Do you know what the forecandle of a ship is?

Mr. TAKEOKA.—Forecandle of a ship? No.

Mr. KING.—Do you know what a pilot is?

Mr. TAKEOKA.—Pilot, yes.

Mr. KING.—What is a pilot, Mr. Takeoka?

Mr. TAKEOKA.—Why, it act as the guide when the steamer comes in—show you how to bring a ship into the port—a pilot.

Mr. KING.—Yes; do you know what the bearing is?

Mr. TAKEOKA.—Bearing?

Mr. KING.—Ship's bearing?

Mr. TAKEOKA.—No.

Mr. KING.—Do you have any knowledge of the instruments used to take bearings on board ships?

Mr. TAKEOKA.—I do not.

Mr. KING.—Do you still renew your objection, Mr. Snow?

Mr. SNOW.—I still renew my objection. May it be stipulated that I have had a great deal of difficulty in obtaining the [504] services of an interpreter, and only secured Mr. Takeoka through

the kindness of Mr. Toda, who telephoned him, I believe, last night, and at any rate this morning, and I have been unable to secure the services of a Japanese interpreter more fully acquainted with ships and shipping terms than Mr. Takeoka. You are a business man, are you, Mr. Takeoka?

Mr. TAKEOKA.—Yes.

Mr. SNOW.—Are you an American citizen or a Japanese citizen?

Mr. TAKEOKA.—I am a Japanese subject; yes.

Mr. SNOW.—What business are you in?

Mr. TAKEOKA.—General produce business.

Mr. SNOW.—In Portland?

Mr. TAKEOKA.—Yes; buying potatoes, onions, and—

Mr. SNOW.—Buying and selling all sorts of foodstuffs?

Mr. TAKEOKA.—Yes.

Mr. SNOW.—That is all.

Mr. KING.—Mr. Snow, may it not be stipulated that you called, in an effort to get Mr. Takeoka yesterday, and were unable to get him then, and at your request Mr. Toda reached him this morning?

Mr. SNOW.—Oh, yes, indeed.

Mr. KING.—In other words, there is no insinuation that Mr. Takeoka was our selection for you?

Mr. SNOW.—Oh, no; not at all; not at all.

Mr. KING.—And the libelant now offers, if proctor for respondent deems it necessary, and imperative to his interests, to detain the "Boston Maru" in Portland to allow him additional time to pro-

cure an interpreter, such as he deems necessary to protect his interests in taking this testimony, such additional time, however—the expense of demurrage for such additional time to be borne by proctor for respondent. [505]

Mr. SNOW.—If you will name a time at which you wish to adjourn these depositions to, I shall be glad to do my best to find an interpreter better acquainted with shipping terms than Mr. Takeoka. The respondent, of course, denies any liability for demurrage or any other liability in the case.

Mr. KING.—It may be stipulated, Mr. Snow, that the taking of the depositions was adjourned to this morning at your request, in order to afford you an opportunity to procure an interpreter to represent you at this hearing, and that since that time we have not only deferred the hearing but have rendered every aid and assistance in an effort to get you an interpreter?

Mr. SNOW.—It is true that you have given me every aid. I don't think I especially requested the adjournment until this morning.

Mr. KING.—Well, the record will speak for itself.

Mr. SNOW.—Yes, the record will show.

Mr. KING.—The proceedings were had last night.

Mr. SNOW.—The record will show. I tried my best to get an interpreter.

Mr. KING.—The point is this: The libellant is willing and ready to have any interpreter who is fully acquainted with shipping terms to sit jointly with Mr. Toda, or act solely, if fully competent,



as the interpreter for the taking of the testimony of these witnesses, but the libelant, without assurance from respondent, will not further detain this ship, which is now ready to sail, and intends, therefore, to take the depositions at the present time, as counsel has given us no further assurance that an interpreter will be present at a later time to-day, than he could give yesterday that one would be present at ten o'clock this morning, and it is now eleven-thirty—pardon me, eleven [506] twenty-five—and that libelant and its witnesses were present at ten A. M. this morning and have deferred and waited until eleven twenty-five in an effort to assist proctor for respondent to procure an interpreter. Now, I think we are entitled to go ahead.

Mr. SNOW.—I don't think I could honestly promise to have an interpreter here at any fixed time better acquainted with shipping terms than Mr. Takeoka, and I don't think that it is the duty of the proctor for the respondent to furnish an interpreter for depositions taken on behalf of the libelant. I think that duty falls upon the libelant. I am willing to go ahead under the present record, with all my objections reserved, or delay the depositions, as may be desired.

Mr. KING.—Well, if you will stand the expense of the delay we will delay, but we are not going to hold the ship when you deny liability.

Mr. SNOW.—Well, I can't do that.

Mr. KING.—Well, then, we shall proceed to take these depositions. And we will further state in the

record that we have no knowledge at this time of any interpreter in the city of Portland qualified in knowledge of shipping terms, and wholly unconnected with any shipping interests involved in the present litigation, upon whom we can call to act as interpreter to take these depositions. In the absence of such knowledge we called upon Mr. Toda as the only man of whom we have knowledge. If proctor for respondent can furnish us the name of any other man available, we will be glad to call him in.

Mr. SNOW.—I can't at the present time. If it is desired to delay the depositions I will try to find somebody, although that duty does not fall upon me.

Mr. KING.—Yes, but it may be stipulated, Mr. Snow, that from [507] two o'clock of yesterday, November 10th, you have not furnished us with the name of any disinterested man, qualified to act as interpreter, with full knowledge of shipping terms?

Mr. SNOW.—Well, I think that can be agreed. I don't know,—

Mr. KING.—Well, it is a fact.

Mr. SNOW.—I don't know about the qualifications of the various gentlemen I telephoned yesterday.

Mr. KING.—Do you now know of any Japanese interpreter totally disinterested, who is qualified to act as interpreter?

Mr. SNOW.—I do not at the present time.

Mr. KING.—Now, with that record I think we will proceed. And libelant further offers at this

(Deposition of Isokichi Chiga.)

time to permit proctor for respondent to have Mr. Takeoka sworn as an interpreter and to sit in and offer such suggestions and corrections in the translation and interpretation of the testimony as he deems fit, as representative of the respondent.

Mr. SNOW.—That offer is declined. I don't think we should attempt to proceed here with two interpreters.

Mr. KING.—Well, then, we will go ahead. That is all we can do. We are perfectly willing to do everything we can, but we have reached the very end of the rope.

Mr. SNOW.—I recognize that counsel permits me to have Mr. Takeoka present for my own private advice and avail myself of that opportunity.

Mr. KING.—Well, we don't permit Mr. Takeoka to make any statements as to the correct interpretation of the testimony unless he is under oath. I mean, he can advise you personally, but we don't permit him to state anything in the record. Now we are ready to go ahead.

(The following questions and answers were interpreted [508] and translated by Interpreter Toda.)

(By Mr. KING.) Have you stated your name to the reporter? A. Yes, I have.

Q. What license do you hold?

A. Second mate license.

Q. From what government?

A. Japanese government.

Q. How long have you held that license?

A. Since July 3d, last year.

(Deposition of Isokichi Chiga.)

Q. What ship are you now aboard as second mate? A. "Boston Maru."

Q. How long have you been aboard her?

A. July 30th last year—since July 30th last year.

Q. Were you aboard the "Boston Maru" when she left Portland on Saturday, October 25th?

A. Yes, I was on.

Q. Did the "Boston Maru" come to anchor anywhere in the Columbia River? A. Yes, she did.

Q. Were you on duty, on watch, rather, when she came to anchor? A. Yes, I was.

Q. What did you do after she came to anchor?

A. After steamer anchored and ship were no longer moving I took bearings.

Q. Do you have a chart showing a list of Columbia River lights on board your vessel?

A. Yes, I have a chart.

Q. How many lights did you take the bearings of?

A. Three lights.

Q. I hand you a chart marked Libelant's Exhibit 2 and ask you to [509] point out on that chart the lights that you took bearings of.

A. (Witness indicates.)

Mr. KING.—Let's go slower so we can indicate them in the record. Have him point them out one at a time, Mr. Toda.

A. This one.

Mr. KING.—May it be stipulated—

Mr. SNOW.—It is stipulated that the witness indicates St. Helens lower F. R. No. 28-2.

(Witness indicates again.)

(Deposition of Isokichi Chiga.)

Mr. SNOW.—St Helens bar range front F. R.

Mr. KING.—That is H-8, Sub. 2, I guess.

Mr. SNOW.—Correct.

Q. (By Mr. KING.) Now have him point to the third one.

A. This one.

Mr. SNOW.—Columbia City rear F. W.

Mr. KING.—It has no number on the chart.

Q. Explain how you took the bearings of each light; what instrument did you use?

A. We have on board a compass, a compass which is attached with a shadow-pin in center, and I stand back of that pin and sight the object. When I have the object sighted I read the angle on face, on the dial of the compass. That is how I get the bearing.

Q. What kind of a compass do you have on board? A. It is a Thompson System Compass.

Q. Is that a magnetic compass?

A. Yes, sir; magnetic.

Q. Did you write down the angles or bearings of each point after you took them?

A. I read the angle and made the third mate write them.

Q. Did you see what he wrote so as to know if he wrote it down [510] correctly?

A. It is a custom of my vessel for me to tell the third officer the figure and he replies the figure I give him, and in that way I know that he is correctly writing my angle.

(Deposition of Isokichi Chiga.)

Q. Did the third mate reply to you in this case on each bearing? A. Yes, he did.

Q. Were you on watch when the collision took place? A. Yes, I was on.

Q. Were you on duty—I mean, was it your watch when you took the anchor bearings?

A. I was on duty from twelve o'clock and on, and at the time of the collision.

Mr. TAKEOKA.—Twelve o'clock midnight.

Interpreter TODA.—Twelve o'clock midnight, the time steamer anchored the steamer is all stand by; therefore I was on my duty at that time.

Q. (By Mr. KING.) In other words, it was his duty to be on deck any time the steamer came to anchor; he always did that, whether it was his regular watch or not?

A. At that time I must always be on station.

Q. Did you take a reading of the direction which the ship's head pointed after it came to rest at anchor?

Interpreter TODA.—What is that again?

Q. Did you take a reading on the compass of the direction which the ship's head or peak, or bow, pointed after she came to rest at anchor?

A. Yes, I made sure.

Q. Did you tell the third mate to write that down, too?

A. It is the duty of the third mate to write, and he must have written. [511]

Q. But did you give the third mate what to write as to the direction of the ship's bow?

(Deposition of Isokichi Chiga.)

A. Third mate looked the fore of the vessel and I also looked, and third officer wrote when I told him.

Q. Did the third officer call back to him what he wrote down so as to check it, like he did the other bearings? A. Yes, he read.

Q. Where is your compass located on board the "Boston Maru"? A. On the upper bridge.

Q. Do you know of your own knowledge how many fathoms of anchor chain were paid out?

A. Captain said two cables, and so I remember it to be two cables.

Mr. SNOW.—I move to strike the last answer as hearsay.

Mr. KING.—No objection. It may be stricken.

Q. Were you on watch when the collision took place? A. Yes.

Q. When did you first see the "West Keats"?

A. At one forty.

Q. Did you know her name when you first saw her? A. No, I didn't.

Q. Where were you standing when you first saw her? A. On the lower bridge.

Q. Were you on the port or starboard side of the ship? A. On the starboard.

Q. And in which direction did you see the "West Keats"?

A. I could not tell the degree, but it was on the starboard quarter.

Q. You mean on the starboard quarter of the "Boston Maru"?

(Deposition of Isokichi Chiga.)

A. Yes, the starboard quarter of "Boston Maru."

Q. About how far away was the "West Keats" when you first saw her? [512]

A. I could not tell very well, but about half a mile.

Q. What was the condition of the weather at that time when you saw her?

A. I saw a star above me, and I judge possibly one-half stars out.

Q. Was the weather clear or cloudy?

A. Cloudy, but that night we could see quite well, because no such thing like gas.

Interpreter TODA.—I think, if you will excuse me, Japanese seamen always say gas instead of fog.

Mr. KING.—Instead of fog?

Interpreter TODA.—Instead of fog, yes. That is common.

Q. Was there any fog at that time at about one forty A. M.? A. No fog.

Q. What happened after you first saw the "West Keats"?

A. It so happened that our steamer was anchored, and after I saw "West Keats" I watched her as she came by, but if it was navigating period I would, if necessary, wake captain or take other precautions, but this time it happened that our steamer was anchored, so I watch the other steamer; I merely watched the other steamer.

Mr. KING.—Do you want to check up with your interpreter?

Mr. TAKEOKA.—Yes, it is all right.



(Deposition of Isokichi Chiga.)

Mr. KING.—He says it is all right, does he? I just want to know.

Mr. SNOW.—It was a long answer, but Mr. Takeoka says the substance of it was given by the interpreter.

Mr. TAKEOKA.—Yes; correct.

Q. (By Mr. KING.) Did the other steamer, meaning the “West Keats,” strike your ship?

A. Yes, it struck. [513]

Q. About how many minutes after you first saw the “West Keats” did she strike your ship?

A. Approximately three minutes.

Q. Could you observe the course which the “West Keats” was steering during those three minutes?

Interpreter TODA.—“Could you observe”?

Mr. KING.—Yes. Could he see the direction she was steering during those three minutes? I mean, if he was watching in a position where he could tell which way she was steering.

A. I could see that the steamer was coming towards our steamer, and I could see that the steamer was coming down the river.

Q. Did the “West Keats” change her direction or change her course while you were watching her?

A. That I could not tell. Being at night a little changing of a course I can't see.

Q. Well, did the “West Keats” have her navigation lights burning? A. Yes, she did.

Q. What lights was she showing when you first saw her, what navigation lights?

A. That I don't remember. My steamer is an-

(Deposition of Isokichi Chiga.)

chored and other steamer coming, and I don't particularly pay attention to know which lights I saw.

Q. When the "Boston Maru" came to anchor in the evening about what time was that?

A. On the 25th, eight-thirty.

Mr. TAKEOKA.—Eight-thirty P. M., wasn't it?

Interpreter TODA.—Yes, eight-thirty P. M.

Q. (By Mr. KING.) What was done, if anything, concerning the lights of the "Boston Maru" after she came to anchor?

A. When the steamer anchored we took off the navigating light and [514] put anchor lights up.

Q. First, tell how many anchor lights were put out, if you know? A. Two lights.

Q. Tell where those two anchor lights were hung.

A. In the fore the light is on the forestay, and on the after on top of the flagpole.

Q. You say you saw the "West Keats" off the starboard quarter when you first saw her?

A. Yes, I saw that.

Q. Was that the forward starboard quarter or the aft, stern starboard quarter?

A. By starboard quarter it always means after starboard quarter.

Q. Prior to the time that you came out on the bridge and saw the lights of the "West Keats" off your starboard quarter what had you been doing?

A. As we have order to shift the boat at one forty-five, I was getting my charts in proper order and went on bridge to tell quartermaster to go around and wake everybody up.

(Deposition of Isokichi Chiga.)

Q. So that you had come out onto the bridge from the chart-room; is that true? A. Yes.

Q. And when you came out of the chart-room onto the bridge, then is the time that you first saw the lights of the "West Keats"? A. Yes.

Q. At the time that you first saw the "West Keats" do you know whether the tide was flooding or not—flood tide?

A. The fore of my vessel was pointed down towards the river, so I think it was then flooding.

Q. Flood tide?

A. Yes; he said the beginning of flooding. [515]

Q. Yes, I know. Do you know at what time the tide began to flood?

A. I don't know exactly, but I think about ten after one.

Q. After the "West Keats" struck the "Boston Maru" what did you do?

A. When I realized that the ship was hit I went running over to tell the captain, but at that time I already saw him coming out, so I ran to the stern of the vessel.

Q. Where was the "West Keats" at that time, how far away, do you think?

A. I could not tell exactly, but one hundred feet or so.

Q. You mean one hundred feet or so off the stern of the "Boston Maru," away from the stern?

A. Yes, from the stern.

Q. Could you see the shore line on either side of the river?

(Deposition of Isokichi Chiga.)

A. I could not see the Washington side very well, but I could see the Oregon side.

Q. Do you mean by shore line the lights on the Oregon side or the land?

A. I saw a light or two, but I saw the shore line also. Of course being at night I could not see so very well, but I could tell that they were the shore line all right.

Q. How far could you see a light that night?

A. From my experience I say a night of that kind I could see ten miles, I think perhaps as far as twenty miles.

Q. You mean you could see any kind of a light that far, or what type of a light?

A. Such light as a spot light I could not see that far, but a light that will carry twenty miles I could see.

Q. How far could you see a light, such as one of your anchor [516] lights aboard the "Boston Maru"? A. I think I can easily see three miles.

Q. When the "West Keats" was off your stern was she nearer to the Oregon shore than the "Boston Maru" after she hit? A. Yes, nearer.

Q. About how many feet do you think?

A. I could not tell very well.

Q. After the "West Keats" struck the "Boston Maru" were your anchor lights still burning?

A. Yes, they were.

Mr. KING.—You may inquire.

(Deposition of Isokichi Chiga.)

Cross-examination by Mr. SNOW.

Q. You were pretty close to the Oregon shore, weren't you, at the time of the collision?

A. I was closer to Oregon shore than I was to Washington.

Q. How close were you to the Oregon shore?

A. I could not tell the footage by sight.

Q. When you first saw the "West Keats" I understood you to say she was on the "Boston Maru's" quarter; that is astern of amidships: is that correct? A. Yes.

Q. I suppose she was pretty near amidships, wasn't she?

A. I could not say; I could not tell very well, but seeing from my bridge the vessel must have been in starboard quarter. When I am on the bridge and sight an object with an instrument I could tell whether it was amidships or not, but when you see with ordinary eyes you can't tell whether a boat is—you can't tell the exact position of the boat.

Q. Are you talking now of the time when you first sighted the [517] "West Keats," or a time right before the collision?

A. When I say starboard quarter I mean when I first saw it.

Q. How many compasses have you on board?

A. Three and two boat compasses, making total five.

Q. With which one of these five compasses did you take bearings when you first came to an anchor?

A. By standard compass.

(Deposition of Isokichi Chiga.)

Q. Magnetic compass? A. Yes, magnetic.

Q. Wet or dry? A. Dry compass.

Q. Was that what you call the ship's compass?

A. To determine the ship's course this is the compass, but they are compass for other purposes.

Q. Did you take the bearings with the same compass that you use to steer by to determine the ship's course at sea?

A. Yes; he says it is the compass for bearing, His compass he mentioned is the compass for bearing.

Q. For bearing? A. Yes.

Q. The ship's compass, or the compass you steer by at sea, I suppose is another compass?

A. The same compass.

Q. The same compass? A. Yes.

Q. Where is this compass located?

A. In the front part of the upper bridge.

Q. Is that where the quartermaster stands when he is steering the ship at sea?

A. This place is twelve or thirteen feet from where quartermaster stands. The place where quartermaster stands to steering gear [518] this compass is about twelve to thirteen feet.

Q. Does the quartermaster have another compass to steer by?

A. Yes, there is a compass right in front of the wheel.

Q. And this compass is twelve or thirteen feet forward of the other, or in another direction?

A. Which compass do you mean?

(Deposition of Isokichi Chiga.)

Q. The compass by which he took the bearings; is it forward of the quartermaster's compass?

A. The compass for bearing is in fore of the quartermaster's.

Q. And about twelve or thirteen feet?

A. Yes—not twelve or thirteen feet from the other compass, but from where the quartermaster stands.

Mr. TAKEOKA.—About nine feet.

A. (Continuing.) Suppose this is where quartermaster stands (illustrating), then the quartermaster's compass is there and then bearing compass ahead.

Q. (By Mr. SNOW.) Is the steering compass or the quartermaster's compass a liquid compass?

A. That also is dry compass.

Q. What is this shadow-pin that you speak of?

A. By shadow-pin I mean brass pin which is made to fit the hole in the center of the compass that stands straight up.

Q. What do you sight that brass pin on when you take a bearing?

A. I sight from this brass pin to any object that I want to see, such as light, and when I get the object sighted then I read the dial for degrees.

Q. The dial shows both in degrees and the ordinary points of the compass, does it?

Interpreter TODA.—I don't get the word.

Q. (By Mr. SNOW.) Does the compass dial read both in degrees and [519] points? By point I mean west by north, or south southwest; by degrees

(Deposition of Isokichi Chiga.)

I mean the degrees totaling three hundred sixty around the dial. A. Yes, it reads in both.

Q. It reads in both, does it? A. Yes.

Q. Do you know when the standard compass by which you took the bearings was last repaired or adjusted?

A. It was adjusted on the 11th of September, at Kobe.

Q. Which year? A. This year.

Q. Did you see it adjusted?

A. Yes, sir; I saw them adjusting.

Q. Who did the adjusting?

A. I don't remember the name of the people, but it is the people that do that as business.

Q. People from ashore?

A. That is ashore people; that is people that don't habitually live on water.

Q. Who pointed out the lights to you on which you took the bearings?

A. The pilot told me, "This is Columbia light," but I can by tracing different lights know which lights are which.

Q. What do you mean by tracing different lights?

A. By tracing different light I mean looking at tower lights—the shore light—it is the light placed there purposely to show—what do you call that, pilot light? The Japanese word, Mr. Takeoka, is (Interpreter Toda and Mr. Takeoka conversed in Japanese language).

Interpreter TODA.—Supposing it is a dangerous place, a light [520] built there.



(Deposition of Isokichi Chiga.)

Mr. SNOW.—Lighthouse?

Interpreter TODA.—Yes, that is it, a lighthouse.

Q. What lighthouse is that that I am pointing to on the chart?

A. This was a very red light. This light is a light that is red always.

Mr. KING.—I would like to have the record show which light proctor for libelant indicates.

Mr. SNOW.—It may be stipulated, I think—did you see me point?

Mr. KING.—I didn't exactly pick it up.

Mr. SNOW.—I pointed to the St. Helens lower light, No. 28-2.

Mr. ILLIDGE.—That is the lower jetty light?

Mr. SNOW.—The lower jetty light.

Q. How many range lights were in sight of your vessel at the time you took your bearings?

A. I don't remember how many, but there were many even toward the lower stream.

Q. Were some of them downstream from you, some of the range lights?

A. I saw lights on lower stream.

Q. Were they range lights?

A. The light I saw in lower stream, that appeared to me like range lights; I think they were two.

Q. Those two lights were downstream from the "Boston Maru," were they?

A. I don't remember whether there were two or three, but I think about two.

Q. There were lots of shore lights back here, weren't there, when you came to anchor, in fact?

(Deposition of Isokichi Chiga.)

A. Yes, there were. [521]

Mr. SNOW.—May the record show that I pointed to a place approximately back of this group of range lights in asking that question?

Mr. KING.—Indicating the Columbia City range lights and a point where the words “Columbia City” appear on the plat.

Mr. SNOW.—Approximately, yes.

Q. Now, you took bearings on two of these range lights, did you?

Mr. KING.—Indicating the same group of lights.

Mr. SNOW.—Indicating the same group of lights.

A. Yes.

Q. How did you know which two you were taking bearings on?

A. I took this range light first, then drew a line on the chart; then I took this light and drew a line on the chart; then I took this light and drew a line on the chart; and when these three lines come together, then I know that my sighting is correct. If I should take some other here, why, then, it would form a triangle there and they would not come to a point.

Mr. KING.—May it show that the witness in answer to the question prior to the previous one indicated lines extending from a point appearing on the plat indicated by the little diagram in red of a ship and one line extending from that point to Columbia City rear fixed white, and another extending from there to the St. Helens bar range front fixed red.

(Deposition of Isokichi Chiga.)

marked H 8 sub-numeral 2, and another red line extending from that point to the St. Helens lower front range, marked No. 28-2? That will explain his testimony.

Mr. SNOW.—Yes.

Q. What color is this light to which I point? And I point to the forward St. Helens bar range light—the upper St. Helens bar range light. [522]

A. This is red light, and that light is the light that is always burning—another way of saying is, it don't shut off and burn, and shut off and burn.

Q. What color is the rear Columbia City range light to which I point?

A. This is a white light. By that I mean the light has no color.

Q. Is it a fixed light or does it go on and off.

A. Fixed light.

Q. Now, the rear Columbia City range light shows on the chart as being pretty close to the rear St. Helens bar range light. How were you able to tell one from the other when you took your bearings?

A. You had reference to two lights?

Q. I had reference to these two lights. Let me repeat the question. The question was this: The rear Columbia City range light, to which I point, shows on the chart as pretty close to the rear St. Helens bar range light, to which I now point. How could you tell when you were taking your bearings which one of those two you were looking at?

A. I have on my charts the lights indicated, and when I know that I take one and I take the one right next to it, then I know it is this one.

(Deposition of Isokichi Chiga.)

Q. How can you tell which one is next to it when you are out in the stream?

A. It may be that some lights are before another light and you could not very well tell, but when swinging from one direction to another of course I can tell that the light comes next, and then so on.

Mr. SNOW.—That is all. [523]

Redirect Examination by Mr. KING.

Q. When you give an order to your quartermaster, the man at the wheel, do you tell him direct from one person to another, or do you phone it down through a tube or a wire?

A. Such as order to shift, and so forth, it is an order that goes from either the captain or pilot, but if I was to do it I tell him direct.

Mr. KING.—That is all.

And further deponent saith not.

Signature waived. [524]

## DEPOSITION OF TOYOJI TOMITA, FOR LIBELANT.

TOYOJI TOMITA was thereupon produced as a witness in behalf of the libelant and, having been first sworn, through Interpreter Toda, to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. KING.

Q. Will you give the reporter your name, please?

A. Toyoji Tomita.

(Deposition of Toyoji Tomita.)

Q. Do you hold a license as an officer of a steamer?     A. Yes, I have.

Q. What license do you hold?

A. Second mate license.

Q. What government issued your license?

A. The Japanese government.

Q. What ship are you on board now?

A. On board "Boston Maru," of Kokushai Kisen.

Q. How long have you been with her?

A. Since September 7th.

Q. What year?

A. Since September 7th, this year.

Q. Were you on duty when the "Boston Maru" came to anchor down the Columbia River from Portland?     A. Yes, I was.

Q. When she came to anchor what did you do about her lights, if anything?

A. I gave my duty of attending to anchor light, put up anchor lights.

Q. How many did you put up?

A. I put up two lights, one in fore and one in aft; one in fore about twenty feet up, and one in aft about thirteen feet up. [525]

Q. What was done to the navigation lights?

A. When anchor was put down we took away.

Mr. KING.—Mr. Reporter, will you mark this sheet of this book as Libelant's Exhibit 3 for Identification.

(The sheet of the book so referred to was marked Libelant's Exhibit 3 for Identification.)

(Deposition of Toyoji Tomita.)

Q. I hand you a book and ask you to state what it is, if you know.

A. This is a rough log-book of my ship.

Q. You mean of the "Boston Maru," of course?

A. I mean "Boston Maru."

Q. I direct your attention to the page thereof headed 25th October, and marked Libellant's Exhibit 3 for Identification, and ask you to state what that page is, what it shows. Pardon me; I will shorten this a little. What I want to know is, does that show a record of the events of that day?

A. Yes; the things happened on the 25th of October.

Q. After the "Boston Maru" came to anchor off the Columbia City what did you do, if anything, in connection with taking the anchorage bearings?

A. I with second mate took the bearing; I put the bearing on memo and the lines of bearings were drawn on a chart.

Q. Did you write the bearings in this rough log?

A. Yes, I wrote.

Q. In whose handwriting are all the entries in that log of the 25th of October?     A. All mine.

Q. All yours?     A. Yes.

Q. Who gave you the bearings to put down on your memorandum? Who told you the bearings?  
[526]     A. The second mate.

Q. Did you write them down correctly on your memorandum?

A. When the second mate told me the bearing I

(Deposition of Toyoji Tomita.)

write and repeat the bearing that he gives. That is the way we do.

Q. Now, does he know that he wrote them down correctly? Is he sure of that? A. No mistake.

Q. He made no mistake? A. No mistake.

Q. Now, does he know that he copied them correctly from his memorandum into the rough log-book here? A. No mistake.

Q. He made no mistake?

A. No mistake—made no mistake.

Q. Does he mean that he is sure that he copied them correctly?

A. Yes, sir; I made no mistake.

Mr. KING.—Libelant now offers in evidence that portion of the page marked in rough log Libelant's Exhibit 3 for Identification, which shows the position of ship's head and the anchorage bearings about the middle of the page on the right-hand side.

Mr. SNOW.—That is objected to on the ground that the rough log, or the portion thereof offered, is hearsay and a self-serving declaration, not admissible, and is incompetent.

Mr. KING.—The same is offered on the ground that it is a record made at the time which the witnesses making knew to be correct at the time; it is a written memorandum of a transaction which is past, which the witness knew to be correct at the time. Now, if proctor renews the objection I would like to recall the second mate for one question, to wit, whether he has a present recollection

(Deposition of Isokichi Chiga.)

of those bearings, independent of this record.  
[527]

Mr. SNOW.—Yes, I renew the objection to the log.

Mr. KING.—I want to have him step to one side, Mr. Toda, and have the second mate for just one question.

(Witness withdrawn.)

Signature waived. [528]

#### DEPOSITION OF ISOKICHI CHIGA, FOR LIBELANT (RECALLED).

ISOKICHI CHIGA was thereupon recalled as a witness in behalf of the libelant and, having been previously sworn, testified as follows:

Direct Examination by Mr. KING.

Q. I want to ask you one more question. Aside from this book, I mean if you don't have the book where the bearings are recorded, do you yourself remember those bearings that you took, the anchorage bearings? A. Yes, I remember.

Q. Do you remember all of them?

A. Yes, sir, I remember all.

Q. Well, will you kindly state the bearing of the Columbia—what is that, the St. Helens jetty light?

Mr. ILLIDGE.—We can refreshen our memory by the blue-print.

Q. (By Mr. KING.) Please state the bearing of the St. Helens lower light, being No. 28-2. What bearing was that?



(Deposition of Isokichi Chiga.)

A. South 52 degrees east.

Q. Please state the bearing of the St. Helens bar range front light; what bearing was that?

A. South by east.

Q. What bearing was the Columbia City rear range light? A. South, 13 degrees west.

Mr. KING.—May the record show that the log-books were produced at this hearing, both the permanent log-book and the rough log, at the request of and for the inspection of proctors for respondent also?

Mr. SNOW.—The record so shows.

Mr. KING.—All right.

Mr. SNOW.—They are both marked for identification. [529]

Mr. KING.—And you object to them being in evidence?

Mr. SNOW.—I object to their introduction in evidence by the libelant on behalf of the "Boston Maru."

Mr. KING.—Well, we offer the portion of the—well, we will offer that full page. At this time the libelant will offer the full page marked Libelant's Exhibit 3 for Identification.

Mr. SNOW.—That offer is objected to on the same grounds already stated.

Mr. KING.—Then the libelant offers that portion of the page setting out the anchorage bearings.

(Said page having been previously marked Libelant's Exhibit 3 for Identification is filed herewith as a part of this deposition.)

(Deposition of Isokichi Chiga.)

Q. (By Mr. KING.) Now, will you state the bearing of the ship's head at the time she came to rest at anchorage?

A. Southeast by south one-half south.

Mr. KING.—You may inquire, if there is anything you want to ask him.

Cross-examination by Mr. SNOW.

Q. Once more now: What is the bearing of the St. Helens lower jetty light?

A. South 55 degrees east.

Q. South 55 degrees east? A. Yes.

The WITNESS.—Fifty-two.

Interpreter TODA.—Fifty-two degrees east.

Q. (By Mr. SNOW.) Are you sure which it is now?

The WITNESS.—Fifty-two. [530]

Interpreter TODA.—Fifty-two degrees.

Q. Does that mean—

Interpreter TODA.—Fifty-two degrees, he says.

Q. (By Mr. SNOW.) Does that mean fifty-two degrees east of due south?

A. I think he— (Witness talks further to interpreter.)

Mr. SNOW.—I will ask some other questions.

Q. These are magnetic bearings, are they not?

A. Yes, magnetic bearings.

Q. That is to say, the standard compass by which you took the bearings pointed to magnetic north and not to true north? A. That is right.

Q. You know the difference, do you not, between true north and magnetic north? A. Yes, I do.

(Deposition of Isokichi Chiga.)

Q. And your compass pointed to which?

A. It was magnetic.

Q. It pointed to magnetic north?

A. Magnetic north, yes.

Q. This St. Helens lower jetty light was 52 degrees east of south, was it, by your compass? Can you put that in Japanese?

Interpreter TODA.—East of in an exact southern direction; is that it?

Mr. SNOW.—Fifty-two degrees east of an exact magnetic southern direction, yes.

A. That is 52 degrees, taking south to be zero, it is fifty-two degrees in the east.

Q. In the east of that? A. Yes, of that.

Q. Now, what did you say the bearing was of the Columbia City rear [531] range light?

A. South 13 degrees west.

Q. Does that mean 13 degrees west of due south, taking south as a zero?

A. Yes, taking that to be zero, 13 degrees west.

Mr. KING.—These are all magnetic compass bearings; that is, you are asking these questions on that?

Q. (By Mr. SNOW.) That is magnetic, is it?

A. Yes.

Q. Now, the St. Helens bar front light, what was the bearing of that? A. South by east.

Q. Does that mean eleven and a quarter degrees east of south, taking south as zero?

A. Yes; that means one point east.

Q. One point east of due south? A. Yes.

(Deposition of Isokichi Chiga.)

Q And how many degrees is one point?

A. Eleven degrees, fifteen minutes.

Q. Eleven degrees fifteen minutes? A. Yes.

Q. What did the ship's head bear from the standard compass?

A. You mean the bearing of the head?

A. The bearing of the ship's head, yes.

A. South by southeast one-half south.

Q. Southeast by south a half south? A. Yes.

Q. I notice all the bearings are taken in even points, with the exception of one, which is 52 degrees. Could you take bearings down to the minutes with that compass and shadow-pin? [532]

A. It can't be done to a minute, but with my experience of sighting I am able to sight all right.

Q. Can you sight to the nearest two degrees, or the nearest point? How close can you sight?

A. Up to a half point.

Q. You can sight as close as a half point?

A. I don't mean half a point; I mean half a degree.

Q. You can sight as close as a half a degree?

A. Yes.

Q. But you didn't do it at this time?

A. Yes, I did this time.

Q. But you noted all the bearings on even points or even degrees?

Mr. KING.—I object to that, as the record does not show he noted all of them on even points or degrees.

(Last question read.)

(Deposition of Isokichi Chiga.)

A. I took bearings because they came that way. In the case of due south I say one point, and that is not exactly an even point, or an even degree. That answer is not exact eleven degrees, as it is eleven degrees and fifteen minutes.

Mr. SNOW.—That is all.

Redirect Examination by Mr. KING.

Q. And that is also true of the bearing of the ship's head, isn't it? The bearing he took of the ship's head, southeast by south one-half south; is that an even degree? Ask him that question.

A. The ship's head bearing is not so important. It may be a half a degree off, but that is the bearing I took.

Q. Well, is that an even degree bearing, though? Does that figure out an even degree?

A. It is one-half and not an even degree. [533]

Mr. KING.—I think that is all.

And further deponent saith not.

Signature waived. [534]

DEPOSITION OF TOYOJI TOMITA, FOR LIBELANT (RECALLED—CROSS-EXAMINATION).

TOYOJI TOMITA was thereupon recalled as a witness in behalf of the libelant and, having been previously sworn, testified as follows:

Mr. KING.—You may inquire.

Cross-examination by Mr. SNOW.

Q. Have you got the memorandum paper that

(Deposition of Toyoji Tomita.)

you wrote these bearings on when you took them from the second mate?

A. I haven't the memorandum.

Mr. SNOW.—That is all.

Redirect Examination by Mr. KING.

Q. At what time did you write these bearings into the log-book? Was it on that same day that they were taken or some other day?

A. I wrote in that book right after the bearings were taken.

Mr. KING.—That is all.

And further deponent saith not.

Signature waived.

Mr. KING.—Bring the quartermaster in.

Mr. SNOW.—The quartermaster will be the last?

Mr. KING.—If you want to maintain your objection to the log-book I would like to have the third mate recalled and ask him if he correctly kept it.

Mr. SNOW.—There he is.

Mr. KING.—I mean, not the third mate but the first mate. He is here too.

Mr. SNOW.—All right. [535]

DEPOSITION OF H. YOKOI, FOR LIBEL-  
ANT.

H. YOKOI was thereupon produced as a witness in behalf of the libelant and, having been sworn through Interpreter Toda to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination by Mr. KING.

Q. What is your name?     A. H. Yokoi.

Q. You are an officer on what boat now?

Mr. SNOW.—It is admitted he is the chief officer of the “Boston Maru.”

Mr. KING.—All right.

A. “Boston Maru.”

Q. I hand you a book and ask you to state what it is, if you know.

A. This is an important document stating all the happenings of my boat.

Q. Whose handwriting is this book written in?

A. Third mate.

Mr. TAKEOKA.—He said he signed and approved it.

Interpreter TODA.—Yes; written by third mate.

Mr. TAKEOKA.—Written by third mate, and he approved it.

A. (Continuing.) Yes. This is in the handwriting of the third mate, but the contents I look over each day and check to be correct.

Q. (By Mr. KING.) What do you check against?

(Deposition of H. Yokoi.)

A. The third mate writes in the rough log-book and he brings it and I correct whatever mistake there may be, then he writes over again and brings, then I O. K. That is how I check.

Mr. KING.—That will be all for this man. At this time libelant renews its offer in evidence of the permanent deck log-book, the [536] same having been marked Libelant's Exhibit 1.

Mr. SNOW.—Objected to on the same grounds, as hearsay and incompetent testimony.

(Said page of permanent deck log-book, having been previously marked Libelant's Exhibit 1, is filed herewith as a part of this deposition.)

And further deponent saith not.

Signature waived. [537]

#### DEPOSITION OF N. KOMIYAMA, FOR LIBELANT.

N. KOMIYAMA was thereupon produced as a witness in behalf of the libelant, and, having been first sworn, through Interpreter Toda, to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

Direct Examination by Mr. KING.

Q. State your name.

A. N. Komiyama.

Q. On board what vessel are you a seaman at the present time? A. "Boston Maru."

Q. What position do you hold on board "Boston Maru." A. Quartermaster.



(Deposition of N. Komiyama.)

Q. How long have you been quartermaster on the "Boston Maru"?

A. Since the 15th of March this year.

Q. Were you on board the "Boston Maru" at the time of the collision with the "West Keats"?

A. Yes.

Q. Were you on watch at that time?

A. Yes, I was on watch.

Q. Do you call that anchor watch?

A. Not particularly anchor watch; just a watch.

Q. When did you first see the "West Keats"?

A. I saw her first time after "West Keats" struck and when I jumped on deck cargo.

Q. What were you doing at the time the "West Keats" struck?

A. At that time I was going around to wake everybody up to get ready for stand by and just as I was coming out from the carpenter's room the ship was struck.

Q. What did you do after she was struck? Where did you go?

A. Since I was on deck at the carpenter's place, and realizing [538] something had happened, I quickly run outside on to the top of the deck cargo.

Q. And what did you see?

A. When I came on the deck cargo I saw the other ship, which ship was full of lights.

Q. Full of lights? A. Yes.

Q. How many lights—did you have any anchor lights burning on the "Boston Maru"?

(Deposition of N. Komiyama.)

A. Both the stern—both the anchor lights were burning.

Q. Were they still burning after the collision?

A. Yes, sir, both burning.

Q. When you first saw the “West Keats” where was her bridge with respect to the stern of the “Boston Maru”?

A. I saw the bridge of the “West Keats” a little to the left and I think the bridge has not quite come to the stern.

Q. Wasn't quite even with the stern of the “Boston Maru”? A. I think so.

Q. And how far away was the “West Keats”—I mean the side of the “West Keats” that was nearest to the “Boston Maru,” how far away was that from the stern of the “Boston Maru”?

A. I saw a steamer full of lights in front, and of course I could not tell whether it was ten, thirty, possibly more.

Q. Feet away when he first saw her?

A. When I first saw it looked as though other ship was running against mine.

Q. And does this other ship keep getting further away each moment?

A. Yes; it got further apart—further and further apart.

Q. And by the time that the stern of the “West Keats” was even with the stern of the “Boston Maru,” as the “West Keats” went down [539] the river about how far away was the stern of the

(Deposition of Isokichi Chiga.)

(Deposition of N. Komiyama.)

“West Keats” from the stern of the “Boston Maru.”

A. It must have been quite a ways, because although I tried to see the other ship’s name, the distance was such I could not. It may be thirty, fifty, or a hundred. It was such I could not read the name.

Q. Did the “West Keats” keep on going down the river?

A. Yes, she went ahead. Maybe her speed had been a little lessened.

Q. And did she come back later? Did you see her again? A. Yes, a little while after.

Q. Did she pass the “Boston Maru” when she came back?

A. Yes; it came and passed the ship.

Q. And did it pass on the same side of the “Boston Maru” that it did when it went downstream? A. On the opposite side.

Mr. KING.—You may inquire.

Mr. SNOW.—I would like to recall the second mate, if I can, for about two questions. Let me ask the quartermaster just one question.

Cross-examination by Mr. SNOW.

Q. I understood you to say that the first time you saw the “West Keats” was immediately after the impact of collision; is that correct?

A. It was almost the same, because I went right on to the deck.

(Deposition of N. Komiya.)

Q. That is, you were on deck immediately after the collision, were you?   A. Yes.

Q. And did you say that you were below in the carpenter's room at [540] the time of the collision?

A. It was after I woke him and stepped outside of the room.

Q. After he woke him and stepped outside of the room?   A. Yes.

Q. But before he was on deck; is that correct?

A. The carpenter's room is on deck, and therefore when I am outside of the carpenter's room, then I am on deck. But I must get on top of the deck cargo to see.

Mr. SNOW.—That is all.

And further deponent saith not.

Signature waived. [541]

DEPOSITION OF ISOKICHI CHIGA, FOR  
LIBELANT (RECALLED—CROSS-EXAMINATION).

ISOKICHI CHIGA was thereupon recalled for further cross-examination and, having been previously sworn, was examined and testified as follows:

Further Cross-examination by Mr. SNOW.

Q. Will you please state again—you may have stated it once, but will you please state again exactly where you were at the instant of the collision.

A. I was on under bridge on the starboard side.

Q. Were you arranging the charts then preparatory to the move?

(Deposition of Isokichi Chiga.)

A. I was fixing the chart before I first sighted the steamer.

Q. What were you doing at the time of the collision?

A. I was doing nothing—just watching in the direction of the other boat.

Q. Were you watching the “West Keats”?

A. Yes, the “West Keats,” that steamer that ran into us.

Q. You saw her approaching then from the time you first sighted her until the collision?

A. Yes, I saw her.

Q. Did you look at her continuously, or did you go about other duties while she was approaching you?

A. It was such a short time I was continually looking at it.

Q. When did you first realize there would be a collision?     A. It was not until after she struck.

Q. You didn't realize then that she was going to hit you?

A. I felt that she was coming quite near, but I expected she would change her direction.

Q. Did you notice the position of the “Boston Maru” and the manner in which she was swinging on her anchor chain?

A. At first the steamer was parallel to the shore, then I realized [542] that the steamer is not in her original position, so I can see that the steamer is moving. I could not say just exactly when the

steamer commenced to move, but I think maybe ten after one.

Q. At the time of the collision did you notice that the "Boston Maru" was across the channel?

Mr. KING.—I object to that, unless there is a preliminary question as to whether or not he knows where the channel is there. There was a pilot on board this vessel, and there is no testimony in direct examination as to any knowledge on the part of any of the witnesses as to where the channel is.

Mr. SNOW.—I will withdraw that question and come back to it.

Q. Before the "Boston Maru" started to move she was up and down the river, wasn't she, with her head upstream? A. Yes.

Q. And after she started to move she swung so that she was across the river, didn't she?

A. Yes, sir.

Mr. SNOW.—That is all.

Redirect Examination by Mr. KING.

Q. And didn't she continue to swing some more so that her stern got to be upstream—first, she started with her stern downstream and then she continued to swing and went clear around until her stern was upstream; isn't that true?

Mr. SNOW.—You are leading your witness there, Mr. King.

A. Yes; the stern went up.

Q. (By Mr. KING.) Well, I will withdraw that. And was that the position of the stern at the time that the collision took place, a little bit upstream or somewhat in that position? [543]

(Deposition of Isokichi Chiga.)

A. Yes.

Q. After the "West Keats" struck did she slacken her speed any, slow up any, that you could see? A. No, I don't think—I didn't notice.

Q. Did she go on down the river after she struck?

A. Yes, she went down the river very speedy.

Q. At the time that you saw the "West Keats" coming and you were watching her, did you notice her change her course any?

A. No, I didn't notice whether she changed her course, but she most surely ought to.

Mr. KING.—That is all.

And further deponent saith not.

Signature waived.

Mr. KING.—Mr. Snow, before the reporter leaves, I would like to have an expression from Mr. Takeoka, who was present with you at this hearing as your interpreter, as to whether or not he thinks the questions were truly and correctly interpreted by Mr. Toda, just for the purposes of the record.

Mr. SNOW.—I would like to talk to Mr. Takeoka privately a minute first, and then I will.

Mr. KING.—All right.

Mr. SNOW.—Just come out a minute, will you, Mr. Takeoka?

(Mr. Takeoka and Mr. Snow here left the room and in a short time returned.)

Mr. KING.—Now Mr. Snow, will you make the statement in the record as to what you feel now, after having consulted your interpreter?

Mr. SNOW.—Mr. Takeoka has stated to me that the interpretation [544] of Mr. Toda was substantially correct.

Mr. KING.—And does he know of any material errors?

Mr. SNOW.—He does not state any material errors.

Mr. KING.—All right.

(Thereupon the proceedings hereunder were adjourned.)

Filed June 2, 1926. [545]

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CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO APOSTLES ON APPEAL.

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 545, inclusive, constitute the apostles on appeal from the final decree of said court in the cause of the United States of America, libelant and appellant, against the Japanese steamship "Boston Maru," her engines, boilers, tackle, apparel, furniture, etc., and the Kokusai Kisen Kabushiki Kaisha, a corporation, claimant of said steamship "Boston Maru," and appellee, and the cause of the Kokusai Kisen Kabushiki Kaisha, a corporation, as owner of the Japanese steamship "Boston Maru," libelant



and appellee, against the United States of America, as owner of the American steamship "West Keats," respondent and appellant, which said causes were consolidated by order of Court for the purpose of taking depositions and testimony and for trial, and further consolidated for the purposes of appeal; that the said apostles have been prepared by me in accordance with the praecipe filed by the appellant and in accordance with rules of the court, and contain a full, true and complete transcript of the record and proceedings had in said court in said causes in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing apostles \$75.90, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 10th day of March, 1927.

[Seal]

G. H. MARSH,  
Clerk. [546]

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[Endorsed]: No. 5095. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Kokusai Kisen Kabushiki Kaisha, a Corporation, Claimant of the Japanese Steamer "Boston Maru," Her Engines, etc., Appellee, and United States of America, as Owner of the America Steamship "West Keats," in *Personam*, Appellant, vs. Kokusai Kisen Kabu-

shiki Kaisha, a Corporation, Claimant of the Japanese Steamer "Boston Maru," Her Engines, etc., Appellee. Apostles on Appeals. Upon Appeals from the United States District Court for the District of Oregon.

Filed March 14, 1927.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the  
**United States Circuit Court of Appeals**

For the Ninth Circuit

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THE JAPANESE STEAMSHIP "BOSTON MARU"

---

*Appeal From the United States District Court, for  
the District of Oregon*

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**Appellant's Brief**

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HON. ROBERT S. BEAN, *Judge*

---

GEORGE NEUNER, *United States Attorney,*  
AND MACCORMAC SNOW,

*Proctors for Appellant.*

MCCAMANT & THOMPSON AND RALPH H. KING,  
*Proctors for Respondent.*

FILED

MAY 2 - 1927

F. D. MONCKTON,

CLERK



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In the  
**United States Circuit Court of Appeals**

For the Ninth Circuit

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THE JAPANESE STEAMSHIP "BOSTON MARU"

---

*Appeal From the United States District Court, for  
the District of Oregon*

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**Appellant's Brief**

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HON. ROBERT S. BEAN, *Judge*

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No questions of pleading and practice are to be discussed in this brief nor will any, we think, be raised by respondent. The pleadings raise the issues presented in the District Court and the Assignments of Error bring the same issues to this court. *Italics herein are ours unless otherwise stated.*

The Boston Maru and West Keats were in collision October 26, 1924, at 1:44 A. M. The Shipping Board brought suit against the Boston to recover the damage suffered by the West Keats. Stipulation and claim were filed by Kokusai Kisen Kabushiki Kaisha. This Japanese corporation then brought suit against the Government to recover the damages suffered by the Boston.

Answers were filed and the issues made. The two cases were consolidated and tried together. Damages of both parties were stipulated. The Honorable Robert S. Bean signed a decree in favor of the contentions of the Boston. Separate appeals were perfected in each of the cases and the District Court thereupon consolidated the cases further for apostles, briefing, argument and further consideration by the Circuit Court of Appeals.

We turn to the merits and will contend:

1. That the Boston Maru was anchored at the time of the collision in the worst possible place in which she could have been anchored in that part of the Columbia River; that her mid-ships was approximately 700 feet westerly and 400 feet southerly from the customary anchorage; she was approximately at right angles across the main ship channel; she was allowed to drift with the tide across the channel and no attempt was made by use of her engines or stern anchor to keep her up and down the river; she was lying directly across the channel at the intersection of two Government established ranges designating the channel.

2. That there is no direct evidence in the record tending to prove any specific act of negligence on the part of the West Keats; the preponderance of evidence upholds her conduct; her

negligence, if any, rests on presumption and argument.

#### WEST KEATS' EXHIBIT No. 1

This exhibit is before the court along with the other original exhibits. It is a large U. S. Engineers' blueprint with red and yellow lines and wording inked thereon and also marks made by or in behalf of various witnesses and described in the record. R. E. Hickson, War Department Engineer (A 62), who has been surveying the Columbia River since 1909 for the Government, placed the inked lines on the chart under employment as an expert by the Shipping Board. The chart and additional marks thereon are all authenticated and described in the record.

A chart is at best a poor description of a river. No court can fully understand the facts of a case of this kind due to inability to study the river with the eyes and instincts of a skilled navigator under conditions exactly reproducing the conditions of light and darkness at the time and place of the collision. The blue print is the best substitute for actual observation which the record affords.

#### THE TIDE

The tide which caused the swinging of the Boston was low at St. Helens at 11 to 11:15 P. M. October 25th (A 91). The water remains at the low period for a considerable length of time in

that part of the river, about one and a half hours. The tide was high at the point of the collision at 3:14 A. M. October 26th (A 90), and the rise was 3.7 feet. The current turns backward upstream at the latter part of the flood tide (A 345). The above data were furnished by Mr. Hickson. They are based on current observations and the attractive force on the particular tide in question but does not include variations which might be due to weather conditions. Chiga, who was on watch on the Boston Maru, stated that the current started to flow up stream at 1:10 A. M. October 26th.

#### ANGLE OF BOSTON MARU TO SHORE

We believe that the vessel was about as shown on the chart at the "position at collision," namely, at about right angles to the channel and Oregon shore. Of course the exact direction lines of the channel and the shore are open to question and the court will understand that the determination of these on the river is less easy than on the chart.

Respondent took the depositions of the Japanese officers and crew a couple of weeks after the collision. Second Mate Chiga was on watch at the time of the collision. About three minutes before the collision he saw the West Keats coming down the river. He was then standing on the starboard side of the Boston's lower bridge (A 535-537). He said the Boston was pointing partly

downstream and that he could see the West Keats looking to the starboard and aft. He also said that the current started to run upstream at about 1:10 A. M. (A 565-566). Chiga said (A 566):

Q. Before the "Boston Maru" started to move she was up and down the river, wasn't she, with her head upstream?

A. Yes.

Q. And after she started to move she swung so that she was across the river, didn't she?

A. Yes, sir.

Mr. Snow: That is all.

REDIRECT EXAMINATION BY MR. KING

Q. And didn't she continue to swing some more so that her stern got to be upstream—first, she started with her stern downstream and then she continued to swing and went clear around until her stern was upstream; isn't that true?

Mr. Snow: You are leading your witness there, Mr. King.

A. Yes; the stern went up.

Q. (By Mr. King) Well, I will withdraw that. And was that the position of the stern at the time that the collision took place, a little bit upstream or somewhat in that position?

A. Yes.

Chiga did not have a pilot's familiarity with the river but having taken bearings the night before knew pretty well which way was upstream. Having taken this observation he went inside and his description of events connected with the collision stopped there. He did nothing about the swinging of the Boston, either by way of waking the pilot, getting the stern anchor out to stop the swinging, or giving a stand-by to the engine room with a view of using the engines.

Evidently the Boston drifted shortly before the collision to a point more than at right angles from her position when the bearings were taken. Perhaps the vagaries of the current swung her back a little because Berry and Gillette testified that she was approximately at right angles when they struck her. Of course they could only see her lights and the dimmest outline of her hull, the latter only when they were on top of her. Their judgment is to be taken as approximate only but they are consistent with each other. Captain Swenson of the Keats who came on deck at the sounding of the telegraph a minute before the collision arriving immediately thereafter, agreed with them. (A 383.)

The next man who attempts to state the angle of the Boston was Captain Gildez, who was awakened by the shock and came on the deck of the Boston soon after the collision. With only the range lights and other shore lights and the mov-

ing lights of the Keats to guide him, Gildez says that the Boston was then lying with her stern at an angle of about 45 degrees down stream (A 313). Perhaps the force of the collision knocked her to approximately this position. Captain Swenson says her stern swung down at the impact (A 510).

At the trial respondent attempted to break down the testimony of their own witness Chiga and that of Berry, Gillette and Swenson by asking pilots to examine the photographs of the twisted, bent and broken plates and beams of both vessels and to state as experts from this examination at what angle the vessels came together. Those willing to testify answered for the most part that the angle was about 45 degrees and on cross examination said that they did not know. Page after page of the record is filled with this theoretical testimony. We do not now review it here as we do not regard it as throwing any real light on the issue. We suspect that a marine surveyor, a real expert on such an issue, would have declined to testify thereon.

We think that Mr. Hickson, in locating the Boston on the chart at approximately right angles to the general line of the shore and channel, has followed a clear preponderance of the testimony.

## DISTANCE OF BOSTON MARU FROM SHORE

The vessel is 400 feet long, 53.2 feet beam, draft — feet forward, 26 feet one inch aft and 8,017 dead weight tons. From the compass on the bridge to the hawse hole is 136 feet (A 517). The evening before the collision under Columbia River Pilot Gildez she arrived off Columbia City and dropped anchor heading toward the Oregon shore. The current and tide were running down and she then swung down stream on thirty fathoms from the windlass (A 317). Second Mate Chiga thereupon took the bearings shown on the chart with an ordinary dry ship's compass. The instrument had been tested in Japanese waters a month or two before the collision but at best could be only relatively accurate. The longest leg of the triangle of error is two hundred feet. The two positions of the Boston are platted on the chart from these bearings, but two modifications should be noted.

The first modification is explained by the smaller blueprint attached to the large one. Chiga also took the bearings of the stem of his vessel from the compass which was amidships. When Mr. Hickson came to place the outline of the vessel on the chart he found that the bearing of the bow did not line the vessel up with the current as the same is shown by the arrows on the main chart and the attached blueprint. Hickson's testimony was that these arrows are correctly



placed through observation of currents made from time to time by the Government engineers. There was not much wind when the Boston was anchored, and the wind unless very strong would not change her position much as against the force of the current. We are forced to take one of two conclusions: (1) either Chiga or the compass was in error in taking the bearing of the ship's bow or (2) through some peculiarity the current was not setting in its normal direction. As he plotted the initial position on the main chart Mr. Hickson assumed that the bearing was erroneous and omitted it. In the small chart he assumed that the bearing was correct and that the current was peculiar and so placed the vessel. This difference is important. If the bearing is correct the Boston's anchor was fifty feet nearer the Oregon shore than if the bearing was incorrect.

The second modification is that in turning the Boston around to her assumed position at the time of the collision Mr. Hickson probably left too great a distance between the anchor and the bow. The preponderance of testimony was that in the absence of a strong wind a ship turning on her anchor with the tide would tend to ride her anchor more or less. Hickson represented a considerable sag in the chain but probably not enough to suit a fair interpretation of the record.

There is no testimony as to the actual set of the current when the Boston was anchored. But

Chiga who took the bearings and the man who helped him testified that they were correctly and accurately taken. Therefore the more cogent testimony supports substantially the initial position as shown on the small blueprint. Allowing for more riding of the anchor than did Mr. Hickson, we place the Boston's stern at something like the same location in which it is shown on the big chart. Therefore, we think that the position at collision of the Boston as depicted on the big chart is substantially in accordance with the record.

There is testimony tending to show that the Boston was anchored closer in than her bearings would indicate. Captain Berry, pilot of the West Keats, said that the Keats was about 150 feet away from the Oregon shore at the time of the collision. But the night was extremely dark and he could barely discern the black line of the Oregon bank. Also Captain Gildez estimated that he had anchored her six or seven hundred feet out from the Oregon shore. The closeness of the Boston's stern to the Oregon shore is definitely shown by the testimony relating to the failure of the Keats to answer her starboard helm on account of suction. This clear and undisputed testimony of both Berry and second officer Gillette, supported by much expert testimony, will be described later.

Taking into account estimates of distance, suction, unknown slant of the chain, possible errors in taking the bearings, the collision and other elements, we do not think Mr. Hickson's placing of the Boston at the point of collision is subject to any important criticism. At any rate respondent did not see fit to bring in their own engineer with a chart of their own.

#### MAIN SHIP CHANNEL AND CUSTOMARY ANCHORAGE

Before reading this section of the brief we ask the court to examine the chart again. Note the St. Helens Bar Range consisting of two lights Front F. R. and Rear F. W. at Columbia City. The rear fixed white light is placed considerably higher than the front fixed red light.

A vessel coming down the river after making a turn at the upper end of the St. Helens jetty is navigated to get on this range—that is, to get in position so that the white light is immediately or substantially over the red light. This tells the navigator that he is in the narrow dredged channel along the jetty. After running this range out he is about half a mile from the place where the accident occurred. He then ports his helm and follows along the Oregon coast without lights to guide him save a miscellaneous collection of range and town lights at Columbia City. He is now in a wide deep river, the ranges designating a channel along the Oregon shore. The river for half mile or more below the collision

place is also wide and deep. He follows along the Oregon shore, or a little out and to the right if he should be passing an upriver steamer, until the two fixed white lights of the Columbia City Range begin to close up astern. The lower and front of these two lights as he looks astern appears at first to his right of the upper rear light. After he gets on the Columbia City Range these two lights close up further until the rear light is directly or substantially over the front light. He is now going down stream on the Columbia City Range and will presently pick up lights ahead to guide him further.

Vessels were at the time of the collision frequently anchored just below Columbia City. Attention is invited to the yellow lines marked "Line F. R. 28-2 to F. R. 27-2," being the so-called "Red Range," "Line from Caples Point to Lamonts Light F. W." and "Line from Lamonts F. W. to Courthouse Flag." The court will note that these three lines tend in a general way to converge.

Now the ordinary way of anchoring at night at this point whether coming from upstream or downstream is to go a little below Columbia City where there is a big river in which to turn and maneuver and to come up on one or another of these yellow lines. The one most frequently used at the time was the Red Range. This was not a range at all. It was merely two fixed red lights,

the lower in altitude being at the lower end of the St. Helens Jetty (28.2 miles from Portland) and the upper at the end of a smaller jetty one mile up river or 27.2 miles from Portland. However, the pilots found it convenient to use these red lights in anchoring as they would have used a range in navigating, and gave it the name of the "Red Range."

The navigator would come up on one or another of these yellow lines, which he preferred under existing conditions, until his bridge was a little below or approximately abreast of the Columbia City Front Range Light F. W. There he would cast anchor with thirty fathoms of chain if the weather was mild or more if the wind was high. His vessel would pull with the current until the chain was taut. If the tide rose while his vessel was anchored he might swing to the Oregon or Washington side but he could not interfere with the main ship channel on the Oregon side or be in danger of shallow water on the Washington side.

The court will notice that as to a vessel like the Boston so anchored on the Red Range the bridge at the time of casting anchor would be at or a little below the first "O" in "Position." The anchor dropping from the bow would be 136 feet up river or about or a little below the end of the yellow dash. The vessel could then swing either way with the tide, even in a strong wind, without

damaging herself or interfering in the slightest way with the normal use of the ranges and channel.

This testimony on these matters includes four lines of questions, namely, (1) Where and how the witness anchored vessels off Columbia City; (2) Where and how the witness navigated that part of the river; (3) Where and how the other pilots anchored, namely, the customary anchorage; and (4) Where and how the other pilots navigated, namely, the customary channel. Not every expert in the case testified on all four questions but every expert testified on at least two or more of them. There was little difference of opinion among them except on minor details. The pilots employed by the Boston Maru testified mainly in favor of our contentions on these issues.

These questions are so interwoven in the testimony of the pilots that it seems best to take up their views separately and treat the questions together. First, however, the following summary may be useful:

1. *Where Witness Anchored.* Every pilot said he anchored on one or another of the yellow lines, except Sullivan and Gildez, who said they estimated the distance out from the Oregon bank. Sullivan, however, had not anchored at the locality at or before the time of the collision. No

pilot said that he had ever before or since anchored a vessel where the Boston Maru was placed. Most of the pilots anchored opposite the Columbia City front light. McNelly, Sandstrom, Dalby and Berry anchored a little below it. No pilot anchored above it.

2. *How Witness Navigated.* Every witness without exception used the ranges. They differed only slightly in the place at which they turned off the St. Helens range to get on the Columbia City Range. Captain Gildez said he did not use the ranges but it appeared that he did.

3. *Customary Anchorage.* All the pilots who testified on the subject said that the customary anchorage was over toward the Washington side or at the place where the yellow lines converge, except Gildez, who said the customary anchorage was in the middle of the channel. No pilot testified that it was customary to anchor where the Boston Maru was anchored, or that he had ever before or since seen a vessel anchored there. Dalby, who saw the Boston right after the collision said he had never in his life seen a vessel anchored there. Gildez tried to uphold his place of anchorage as proper but did not go so far as to say it was customary to anchor so as to permit a vessel to swing where the Boston Maru swung, and admitted that he had passed vessels at anchor there, always on the Oregon side of them. No pilot except Gildez testified that there was a custom-

ary anchorage ground any place else in that locality than over toward the Washington shore. Sullivan, although he had never used the red range, testified that he had not anchored there for some time before the collision but he knew of the red range and described how this range came into use for anchoring.

4. *Customary Ship Channel.* Every pilot except Gildez testified that vessels were customarily navigated past Columbia City on the Oregon side and he practically admitted it.

We now proceed to an examination of the testimony.

CAPTAIN DALBY (appearing in the record as "Baldy"), a witness for appellant, was coming up the river with the *Siersted*. After the collision the Keats under a full-astern bell, turned sharply starboard and came to a stop some distance below the place of collision. On seeing this maneuver Dalby stopped his engines and then received Berry's signal to pass to port. Not until then did he see the lights of the Boston (A 153). Dalby then came up substantially on the red range. All the lights of the Boston were on by this time and Dalby said she was 450 to 500 feet over.

He added (A 151):

I never seen a ship anchored there in my life in clear weather.



Court: What kind of weather?

A. Clear weather, I mean not foggy.

Court: Do they anchor there in the fog?

A. In fog we anchor anywhere we can. Naturally a man coming down in the fog don't figure a vessel anywhere; we stop and get the headway off the vessel. *Some places along that river we have places to anchor, and generally swing to one side there and anchor. This is one of the places as long as the atmosphere was clear, as a rule, we go out to the anchorage grounds.*

Anchoring at night Dalby ordinarily comes up on the red range (A 146) to a point below Columbia City Front (A 157).

Q. Did other pilots anchor in that vicinity at times?

A. Yes, a mark we go by when we anchor the ship there to load or do anything out there. We figure easy for ships there to load timber, load off barges; sometimes too deep to load at Columbia City or St. Helens, and take there and anchor there. That is a mark we always use, also a mark on Lamont Bluff and St. Helens Court House. We leave the court house well open on Lamont bluff, but we generally as a rule use that red range as I say. It is very easy to pick up and very simple.

Q. What is that?

A. That is very easy to pick up and very simple to go onto out off Columbia City there.

Q. Have you ever passed other vessels at that portion of the river anchored there?

A. You mean anchored?

Q. Yes, anchored.

A. *Pass them anchored out there on these grounds I am telling you about.* (A 147)

. . . . .

Of course, the channel is over close to the Oregon shore. We come pretty well down to the Oregon shore there and make a turn to deep water there and turn to follow that shore more or less—to that shore, until we get down on to the ranges leading down to Morton Island on the other channel—the other course. (A 149).

We invite attention to Captain Dalby's cross examination (A 156-158). Its exact meaning is uncertain because the court is required to guess at just what the witness and counsel were pointing to on the chart. The witness made it clear, however, that the proper anchorage is not opposite Columbia City but below the town, also it is clear that the witness' practice is to anchor below Columbia City Front, although other witnesses stated that they anchored abreast of that light.

We suggest two simple experiments to determine what "abreast" of this light means. First

place a straight-edge on the Oregon shore, following its general direction at the location of that light. A line at right angles from the light would just about cut through the "s" in "position." Again place a straight-edge along the red range. A line from this range to the light would approximately cut the first "o" in "position."

The court will note how far these points are *below* the anchor of the Boston.

CAPTAIN SANDSTROM, a witness for appellant, said (A 159):

Q. Do you sometimes anchor vessels at some part of the river near Columbia City?

A. Yes, sir, I have at different times.

Q. Do other pilots anchor there too?

A. Yes, sir.

Q. How do you bring a vessel to anchor, opposite what place and at what distance and by what lights?

A. *We generally, as a rule, drop down below the front range of Columbia City ranges and come in on the red ranges of the jetties; the red light on the lower end of the jetty is what we now know as the front light on the St. Helens range—or inside of that, down toward Caples point.*

Q. I am not referring so much to the river as it is now, Captain, because changes

have been made as you know, but the river as it was two years ago, in October, 1924; you then anchored off of what is known as red range, didn't you?

A. Yes, sir, what we called red range, which was the lower end of the jetty light, forming range with the jetty light that extended up above; that formed a range and we would go on that or inside of that down towards Caples Point; was according to if we had swinging room, and anchored the vessels there for loading them on deep draft, when they couldn't have water enough at Columbia City or St. Helens.

Q. Have you seen in the past there, vessels anchored at that location?

A. Yes, sir.

Q. By other pilots?

A. Yes, sir.

Q. What can you say as to whether or not there is a custom with respect to anchoring there?

A. *That has always been the custom to anchor towards the Washington shore. (A 159-160.)*

. . . . .

Q. Where is the main ship channel at that point for navigating up and down the river?

A. Well, the main ship channel you come down on these ranges until you get

about abreast of what we call the dock of the Western Spar Company, their mill there at Columbia City, before you start swinging for the lower course; that is just above the old—the front range or was the front range at that time of St. Helens range; just above that before you make the turn; you run approximately fifteen hundred to a thousand feet probably above it, before you start swinging; that brings you——

Q. You mean at about fifteen hundred to a thousand feet above the range light of St. Helens upper range you start swinging?

A. Yes, sir.

Q. And which way do you swing?

A. Swing to starboard; down towards Columbia City ranges; down to what we call Deer Island.

Q. What shore do you follow down to get to Columbia City range?

A. *You are on the Oregon shore.* (A 161-162.)

CAPTAIN GRUNSTAD, a witness on behalf of appellant, was employed on the United States Columbia River Survey Boat before becoming a pilot. He said (A 174):

Q. Are you familiar with that part of the Columbia River opposite Columbia City, above and below there?

A. Yes, sir.

Q. Is there any anchorage ground in that vicinity?

Mr. McCamant: I think that is a conclusion, your Honor. I think this witness ought to be asked what is the customary way of anchoring vessels.

Court: Yes. You don't mean designated anchorage ground?

Q. I don't mean designated by law; I mean designated by custom. Is there any customary anchorage ground in that vicinity?

A. Yes, sir.

Q. Where is it, Captain?

A. Abreast of Columbia City.

Q. Front or rear?

A. Well, *front*.

Q. Abreast Columbia City or down?

A. Yes, Columbia City Ranges—what is called the Columbia City Ranges.

Court: What do you refer to as the Columbia City ranges, Captain? On the Columbia City side?

A. Yes, direct in the channel down to Columbia City.

Q. Is that customary anchorage ground nearer the Oregon bank or nearer the Washington bank?

A. *Nearer the Washington.*

Q. How do you ordinarily anchor a vessel at that place at night, assuming it is clear and you can see lights? Not assuming fog, or anything where you can't.

A. Well, set by the ranges, *red ranges that we use to anchor on*, and abreast of Columbia City range.

Q. Abreast of Columbia City range lights?

A. Yes, sir. (A 174-175.)

The witness then used the red range at night and anchored abreast of Columbia City Front. The court has noted that Sandstrom anchored below Columbia City Front. The majority of the pilots anchored abreast of this light and a few of them below it. None of them said they had ever anchored a vessel or seen a vessel anchored above it. Gildez placed the anchor of the Boston Maru about 400 feet above the light. Grunstad continued (A 99):

Q. Where is the ship's channel, main ship channel, at that part of the river opposite Columbia City?

A. *It follows the Oregon shore line.* (A 99.)

On cross examination Grunstad said (A 184):

Q. There is a customary anchorage ground in the neighborhood of Columbia City that is known to all the pilots, isn't there?

A. Yes, sir.

Q. And it is customary for vessels desiring to go in to St. Helens to anchor there, isn't it?

A. Yes, sir.

Q. And all of the pilots on the river know that?

A. Yes, sir.

Q. Do all the pilots anchor at the same place at Columbia City?

A. Yes, sir.

Q. They all do?

A. Yes, sir.

Q. *You never have seen a vessel anchored there except at the place you have indicated in your direct testimony?*

A. *No, sir.* (A 184.)

No pilot testified to having seen a vessel anchored there at any other point and Dalby said he had never before seen a vessel anchored where the Boston was.

CAPTAIN BERRY, pilot of the West Keats, said (A 102):

State whether or not there are vessels anchored in that general locality from time to time by the pilots?

A. Yes, sir.



Q. Now, have you anchored vessels there yourself?

A. Yes, sir.

Q. How do you anchor vessels at a point generally opposite the Columbia City range lights at night?

A. I use the lower Columbia City range light; put that abeam out about twelve hundred feet or perhaps a little more; and at that time there was a red range that we anchored our vessels on, which would be the lower light of the St. Helens jetty, and a red light on another little jetty that came out just a little above the St. Helens jetty, on a dolphin.

Q. You speak of that as a red range?

A. Yes. (A 102.)

. . . . .

Q. That light takes you approximately how far out from the shore?

A. A good 1200 feet.

Q. What can you say as to the practices of other pilots anchoring vessels in that locality?

A. I would say they also do the same. I have come up many a time and found them anchored there. I could see they were there, because I could see this range, see the vessel anchored there.

Q. When you first made out the anchor lights of the Boston Maru to be the lights of

a vessel at anchor, state what was your judgment at that time as to the location of the vessel?

A. I supposed she was over on this certified anchorage.

Mr. King: What was that last answer?

A. *I supposed her to be over in this regular anchorage ground, where vessels are commonly anchored for taking on cargo from the water.* (A 103-104.)

Captain Berry (A 104-105) then described the ordinary method of running down the Oregon shore, leaving the St Helens Bar Range at a point about half a mile above the place of the collision and joining the Columbia City Range below it.

CAPTAIN SULLIVAN, a witness on behalf of the respondent, said direct (A 197):

Q. Is it possible for a pilot to anchor at any particular spot in the river after dark?

A. Well it is a very difficult thing, I have found from my experience, to drop ahead any particular spot, with the exception possibly *with the aid of some range or lights that we use especially for that purpose.*

On cross examination the captain said (A 133):

Q. At night, what is the part of the river more commonly navigated by pilots?

A. *The Oregon side.* (A 220.)

The captain said that in anchoring off Columbia City he would get out opposite Columbia City Front and anchor anywhere in the channel where the ship would have sufficient swing without striking her stern (A 221), and would guess the distance out from shore (A 228). On being reminded that there was a wider deeper river below that he replied, yes, but there were no lights to mark it by (A 222). Captain Sullivan said he had never used the red range but added (A 223):

A. I never anchored a ship there after it was put in place; never had occasion to anchor it.

Incidentally it may be noted that the red range came into existence in April, 1923, through the establishment at that time of the fixed red light at jetty 27-2 (A 343). The red light at 28-2 had been established long before in 1919 (A 343). It seems unusual that Captain Sullivan had not anchored a vessel off Columbia City during the period of one and a half years between the establishment of the red range and the collision but we do not question the truth of his statement to this effect. The value of his testimony as an expert on the anchoring of vessels off Columbia City is somewhat weakened by his inexperience.

The testimony of the pilots produces conviction that in anchoring a ship at night in an expanse of water many miles long and three-fifths

of a mile wide from bank to bank, with the banks sometimes almost or entirely invisible and only lights for a guide, a pilot ought if possible to locate himself at least two ways. He should know his position up and down river and, even more important, he should clearly know it cross river. This means getting a line of lights up stream (since pilots ordinarily anchor with the bow up stream in spite of Gildez's attempt to anchor crosswise in the present case) and a light or line on the bank from which to gauge distance up and down river.

Now being abreast of Columbia City Front means one thing to a person on the shore and another to a pilot on the bridge of a moving ship. If the ship is lined with the current or the red range a pilot can readily tell when the light is abeam. If the ship is pointed in any other direction he cannot tell unless he knows how she is pointed. It is not surprising that Gildez having turned around three-quarters of a circle did not know he was 400 feet above the light when he cast anchor.

Every pilot in the case with the exception of Gildez and Sullivan stated the necessity of getting a line both ways. These two emphasized the necessity of getting a point on the bank and eschewed the river below Columbia City Front because of a want of lights there, but both of them said it was sufficient to guess at the distance out.

However, we suspect that both of them knew more than they testified. Gildez we think was just in a hurry to get to bed at the time in question and his testimony was the best argument he could advance in support of his anchorage. Sullivan, without an actual experience in anchoring at the point to fetter him, was merely giving testimony for the side that called him. He was not devoid of information about the red range but told the court more about it than any other pilot. We quote (A 224):

A. My knowledge of that range is this: It seems that one of the pilots by accident discovered in anchoring a ship one night down there, where he was afraid the ship was going to swing over on the *Washington shore* when she swung around—noticed that these two light come in range at the point he was in; when the ship swung around *she cleared the shore and he had forty feet of water under the stern. So he told the other pilots* that when these two lights range, abreast of that fish trap, it is a good place to anchor; but I never happened to anchor a ship there until after that light was moved, and I don't know anything about it, or whether it is or not. Of course moving down the river any distance it would come off the range, but at that particular spot that he described probably they would range, if he said so, but it is not a range, though; not used as a range, or never was intended for a range. Of course if someone has worked that out and discovered those two will range in a certain spot in the channel, and if you

go out and find that spot, you can probably anchor a ship there; but I never had occasion to use it, in my experience, until after moved.

Q. Do you know the name of the pilot that made the discovery that those two lights were handy to anchor by at night?

A. Yes, quite well.

Q. Who is it?

A. His name is Chase.

Q. Chase. What is his first name?

A. Harry. H. L. Harry L. Chase.

Q. You believe that he was the originator of the use of those two lights?

A. That is the first I heard of it.

Q. Did he tell you about using the lights?

A. I don't know whether he told me directly or whether I heard it second hand. My impression is he told me directly.

Q. Can you remember pretty definitely what time this was?

A. No, I couldn't; but he would. He would have—he would have a record of it, and the ship he had, and all about it; but I don't remember. It is just an idea that pilots generally, if they find anything that might be of value to others, that they find themselves, they tell them, scatter the knowledge

around of anything that might be of importance. (A 224-225.)

. . . . .

Q. Do you recall anchoring any vessels there?

A. No, I don't.

Q. When did you last use that anchorage ground, do you remember?

A. It seems to me it was a long time prior to that; I don't recall. (A 230.)

CAPTAIN MORAN, who was called as a witness by respondent, came down the river about 12 midnight with a vessel of two thousand tons burden and 23-24 feet draft. He left the St. Helens Bar Range about a half a mile above the usual point and about a thousand feet below the end of the St. Helens jetty (A 254). About that time (A 255) he made out the lights of the Boston Maru, which was then lying straight down stream.

He proceeded without aid of range lights past the Boston on the Washington side and picked up other lights a long distance down the river, thus saving himself some distance. His more usual practice was to leave the St. Helens Bar Range off the Columbia City mill (A 254). Asked about the red range, he said:

A. I never used the red range; what I generally used to use was the courthouse at St. Helens, and Lamont Point. I kept that

open a couple of hundred feet. That would leave me five or six hundred feet out, or probably more, than where the Boston Maru was anchored. I couldn't rightly say what distance it would be, but it would be five or six hundred feet further out. (A 256.)

. . . . .

If she was anchored out there about as customary to anchor, I would pass on the Oregon shore, in a case of that kind. (A 256.)

Moran said the customary ship channel was rather on the Oregon side (A 257).

CAPTAIN ALLYN testified on behalf of respondent. His method of anchoring at night is to get his bow on Lamonts light and his stern on Caples Point with Columbia City Front abreast of his bridge (A 266).

As to the channel, he said (A 267):

A. Always follow down the Oregon channel when coming up this way.  
Captain Allyn said (A 267):

Q. You would not anchor out just in the middle of the stream without knowing how far to one side or the other you were, if you could avoid it?

A. No, if there is any light so I could see; anyway to see, no: you have to have something to go by.



Q. And you would always take advantage of a light or something you could see, if you could?

A. Yes, always, foggy weather or any other time, always try to get near a light to anchor if possible. (A 267.)

. . . . .

Q. What can you say of the custom of anchoring vessels at that place? Other pilots anchor their vessels there too?

A. *Been anchoring there ever since I been in the pilot business.*

Q. They customarily anchor pretty well out from the Oregon shore over towards the Washington shore?

A. If possible. yes.

Q. So as to leave water for the channel?

A. Yes, the main object is to keep out of the main fairway as much as possible.

Q. And the Oregon shore has been the main ship channel for a long time, has it?

A. *Yes, always pass up and down the Oregon shore if possible, yes.*

Q. Have those two ranges, the St. Helens and the Columbia City ranges, been established for a long period of time?

A. They have been there ever since I have been in the pilot business.

Q. *So always been the custom to navigate the Oregon shore, and to anchor over towards the Washington shore?*

A. *Yes, sir.* (A 269)

CAPTAIN MCNELLY was called as a witness by respondent. He described the point at which he ordinarily turned off the St. Helens Bar Range being a little above where Berry turned (A 276. See marks on chart) adding (A 282) that that was his own method and all pilots did not run the river exactly alike. The captain said that in anchoring at night he used the red range, and added (A 278-279):

Questions by Mr. Snow.

Coming down the river then, if there is no ship at anchor you usually keep out pretty well towards the center, or even to the Washington side?

A. Aim to keep just about in the center.

Q. If there is a ship at anchor, do you usually aim to pass on the Oregon side, or the Washington side, of that ship?

A. Any ship that I have ever passed at anchor there, I have passed on the Oregon side.

Mr. McCamant: Coming down?

A. Coming down. Any ship that I ever remember of seeing anchored out there, I have always passed on the Oregon side coming down.

## Testimony of Captain George McNelly.

Q. In fact, the customary anchorage is over towards the Washington side, isn't it?

A. I have always understood it that way, as a rule.

Q. And the customary ship's channel is over towards the Oregon side?

A. Well, the water is deeper closer to the shore on the Oregon side than it is on the Washington side; more sloping on the Washington side.

Q. In keeping out towards the center you give yourself plenty of water and keep to what you consider to be the starboard side of the channel you follow, don't you?

A. Yes, as long as there is no obstruction; no ships in there.

Q. You have passed ships at anchor there a good many times, have you?

A. Yes, sir. (267.)

Q. Several times at least?

A. Yes.

Q. Ordinary rate of speed. That is, do you maintain your speed in passing them?

A. Always have; yes.

Q. If you were going full speed you would not slacken in order to pass them?

A. Unless they had barges or logs alongside that the swells would do damage to; we would slow down for that reason, but no other reason.

CAPTAIN CHASE, called as a witness by appellant, stated that in anchoring he came up on the red range abreast of Columbia City Front; that the range had been in existence 16 to 18 months before the collision and that he had used it before that time and told other pilots about it (A 297-298). He added (A 298):

Q. What is the customary anchorage ground at that locality?

A. That is customary, as far as I know, the description I gave you.

Q. Other pilots use the same method of anchoring?

A. I don't know what they use, I am sure.

Q. You have passed vessels at anchor there?

A. I have.

Q. Found them anchored over towards the Washington side?

A. *Apparently in the same place I anchor.*

Q. Where is the main ship channel at that locality?

A. All ship channel wherever it is deep.

Q. Do vessels navigating up and down the river, do they customarily navigate on the Washington or Oregon side at that point?

A. *Usually the Oregon side. I have—in fact very nearly all the time on the Oregon side.*

Q. That is on account of the ranges converging?

A. Yes, the range light is there; they come up and pick up the range and follow along that shore line, quite close along that shore line. (A 200.)

CAPTAIN GILDEZ has been employed in the navigation of Columbia River craft since 1910. At the time of the collision he had been for two years a Columbia River pilot. He anchored the Boston at 8:30 P. M., October 25, 1924. He described the weather at the time as (A 307-308)

Dark. Yes, very dark. Cloudy and dark, squally and rain squalls.

Q. Could you see the shore?

A. Not very distinctly; you could see the lights.

There is considerable testimony that there was no fog that night and no testimony that there was fog. In a fog a pilot is probably justified in anchoring any place he can.

He says he came down river on the St. Helens Bar Range and turned to starboard until he was

abreast of the Columbia City Front Range Light heading for the Oregon shore, then let go the anchor (A 308). Evidently he turned around three-quarters of a circle, and it is not surprising that he misjudged his location up and down stream. His anchor was placed more than 400 feet above the light, considering the general trend of the shore. He says that he used no light or landmark to determine his location between the Oregon and Washington shores but dropped anchor at a point which he estimated to be 600 or 700 feet from the Oregon shore. His testimony on the latter point follows (A 330-331):

Q. One of the times you testified before the inspectors, before you learned of the position of the Boston Maru as shown by the ship's bearings, didn't you express the judgment to the inspectors that you had anchored about six or seven hundred feet out from the Oregon shore?

A. Yes, sir.

Q. But you changed that opinion when a later location with bearings showed the Boston Maru to have been about nine hundred feet out?

A. Yes, sir.

Q. How did you arrive at that figure, six or seven hundred feet? Was that your estimate?

A. That was my estimate that night.

Q. So you thought you were anchored about six or seven hundred feet out from the Oregon shore?

A. Yes, sir.

The court can readily demonstrate with a pair of dividers that if he had anchored six or seven hundred feet from the Oregon shore as he thought, the Boston would probably have gone aground shortly before the time of the collision. It makes no difference in this demonstration whether the place from which his estimate was made was the place where the anchor sank or the bridge on which he stood, 136 feet to the eastward.

Captain Gildez was then unfamiliar with the red range, although he had anchored in the daytime by putting Lamonts on the Court House (A 323). Why he should seek a guiding line by day and not by night is not explained. He alone of all the pilots testifying stated that the customary anchorage was in the middle of the channel (A 323), but while he has passed anchored vessels there while going both up and down stream he has always passed them on the Oregon side (A 232-233) and he admitted that it was customary to anchor far enough over to the Washington side to give clearance to navigating vessels (A 333). His testimony respecting the use of the ranges is also out of line and somewhat inconsistent. He said (A 327):

A. The main ship channel down the thirty foot contour not on the Oregon side at all.

Q. You knew the ranges there on the Oregon bank, didn't you?

A. No ranges at this place.

Q. You don't mean to deny the existence of the St. Helens Bar range and the Columbia City range, of course?

A. The St. Helens Bar range and the Columbia City range are not used after pass Columbia City.

Q. Not used?

A. Not used as ranges.

Q. They are not?

A. No, sir.

Q. So you think the pilot made a mistake if he used that?

A. I am not here to estimate what a pilot does. I am just saying what I would do.

Q. You want to be understood as testifying that Columbia River pilots don't any of them use that range?

A. I am not testifying for Columbia River pilots, sir.

Q. You said not used.

A. I am speaking for myself alone.



Q. You don't use ranges in navigating the river at that point?

A. No, sir. (A 328)

After this he was asked how he would bring a vessel down the river and replied (A 328):

A. Coming down we come on St. Helens Range to a point about abreast of these Columbia City Mill lights and head right off down the middle of the channel towards the lights at Kalama, until we picked up the lower Columbia City Range, and went off on that.

Q. How far would it be from the place that you would leave the St. Helens Bar Range until you would pick up the Columbia City Range below?

A. Quite a ways; half a mile I should judge.

Q. Half a mile?

A. I should say.

Q. There would not be more nearly a mile and a half, or two miles?

A. Might be that. (A 329)

We think Captain Gildez' explanation of his unusual anchorage is far from satisfactory. He tried to place his vessel close enough to the Oregon shore to ground her there but luckily misjudged the distance 200 to 300 feet. He tried to

put her opposite Columbia City Front but missed by over 400 feet. He eschewed the wide river below the light because he does not want to anchor by guessing (A 343) but he was willing to guess at the distance out from the Oregon shore.

Obviously Gildez did not use the same degree of care in anchoring as did the other pilots. Also, either his knowledge of the river is indifferent or his testimony lacks candor. We think that if the statute means anything it condemns anchorage of the kind in question.

#### THE ALLEGED SHOAL

The court is invited to examine the chart opposite Columbia City rear and note the circular line of dots indicating the six fathom line with sounding in feet inside and thereabouts. This area of water was termed throughout the case as the "Shoal." The record contains a few pertinent facts about the shoal and a quantity of speculation about it, some pertinent and some not.

In the center of the shoal there is a twenty-five foot sounding. This represents the depth at zero water. At the date of the collision the stage of the water was  $1\frac{1}{2}$  feet above zero (A 89). At extreme low water on the night of the collision there would have been  $26\frac{1}{2}$  feet of water at that point, if the sounding had been correct at the time. At extreme high water there would have

been 30.2 feet. At the time of the collision the water there would have been about 25 feet plus  $1\frac{1}{2}$  feet plus 2.2 feet of tide or 28.7 feet. On the night in question the deepest draft of the Boston was 26 feet 1 inch aft. Therefore she could have floated over the 25 foot mark (assuming the sounding to be correct) at any time at any stage of the water between the time of her anchorage and the next high water upon which she was to proceed to St. Helens. She could easily have floated over this point (even if there had been a shoal at the time) at any stage of the tide high enough to produce a back current.

The shoal consisted of gravel dumped there by a dredge during the week of August 6-14, 1921 (A 193). Mr. Hickson testified after being qualified as an expert on that subject that such a gravel dump would tend to stay there for "a year or so" but would gradually wear away (A 71). Captain Sullivan, who did not qualify as an expert on this subject, ventured the opinion that it would not wash away (A 201).

We think the court will regard Mr. Hickson's testimony on this point as the more credible and will conclude that there was no shoal at the place in question subsequent to, let us say, August 1923. At any rate it is inconceivable that the shallowest portions of the shoal were not gone by that time, or that there was any shoal left by October 1924, the date of the collision.

How then did the shoal come to be placed on a chart issued by the United States Engineers October 1924? Mr. Hickson explained this (A 69-70) and the same explanation is placed on the chart in the form of a note on the Washington side near the shoal. The entire chart with the exception of the corner with which we are concerned was made in 1924. The portion north of the white line indicated by the note was made from a survey of October 1921, two months after the dumping of the gravel.

No witness testified that he had ever seen or heard of a vessel, large or small, anchored or navigating, around on the shoal. Several testified definitely that they had never seen or heard of such an occurrence.

Many ships anchored at the grounds commonly used must have swung over the southerly and westerly portions of the shoal and it is thus clear in the record that the shoal did not render unsafe the usual anchorage on one or another of the yellow lines. In fact Captain Allyn, a witness for respondent, anchoring on the line between Lamonts and Caples Point must in order to avoid the turn in the Washington bank below have placed his vessel right on the edge of the shoal.

We have stated the facts concerning the shoal and the practical treatment thereof by the pilots. May we here suggest that this case involves navi-

gation and anchorage on a river—not on a chart. Some of us landsmen may have partially overlooked this obvious fact during the trial and the court, we believe, gave it insufficient consideration. On the chart the shoal looks like a lot with a fence around it. Actually it looks like the rest of the river, and a lead is always at hand to drop from any part of an anchored vessel at any time for an exact test of depth. Several pilots testified in effect that the lead is an important instrument in anchoring. Respondent elicited from pilots the information that Government charts are sent to the pilot office as they are issued and would perhaps have it appear that the filing of a chart in the pilot office is somewhat analogous to the filing of a deed for record in the county clerk's office. Obviously a pilot putting his vessel ashore through reliance on defective depths shown on a Government chart could not escape the blame, as his business is to know the river and not merely the literature about the river.

It should not be thought that Captain Gildez did not take up the shoal as an excuse for anchoring his vessel about 500 feet westward of and about 400 feet up river from the usual anchorage, and so close to the intersection of the ranges that she might easily have grounded on the Oregon bank if he had placed her where he thought he was placing her. He testified that he knew about the shoal (A 309) although he did not say that he had ever taken soundings there. He said that

he feared that the Boston might go aground on the shoal (A 319).

On direct examination Gildez testified that in anchoring off Columbia City you cannot tell which direction your vessel will swing unless there is a wind blowing and at this time there was scarcely any wind. Continuing (A 310):

Q. Taking the conditions as you have described them up there that night, could you tell at the time you came to anchor which way your vessel would swing?

A. No, sir.

On cross examination he admitted he had testified before the inspectors that from the way the wind was blowing when he lay down the vessel would swing toward the Washington shore; continuing (A 321):

Q. I will ask you whether or not this question was asked and this answer given: You say a wind blew when you went to bed which would swing towards the Washington shore? A. "Yes, sir."

A. Yes, sir.

On pages 321-2 will be found such explanation as he made why he testified one way to the inspectors and another to the court.

After some discussion as to the depth of water on the shoal the following occurred (A 327):

Q. Now by anchoring a little further down the stream you could very easily have avoided that shoal place, couldn't you?

A. Yes, sir.

Q. And anchoring further over towards the Washington shore, and further down, you wouldn't have been in any danger from that twenty-five foot sounding at all, would you?

A. No, sir.

Q. Even if she swung to the Washington shore?

A. No, sir.

A few minutes later he repudiated this statement as follows (A 331):

Q. In fact, if you had gone a little below and further out, you would have been just as safe with your own vessel and would have been entirely away from the fairway, wouldn't you?

A. Not in my estimate, no, sir.

Q. You would have been entirely away from the Oregon shore?

A. I would have been as safe—I would have been out of the way, probably, more, but my ship wouldn't have been as safe, or I wouldn't have known she was as safe as she was. (A 227)

Captain Sandstrom exhibited a practical consideration and use of the waters over the shoal.

He stated that he had sounded it and that as a rule he dropped lead when anchoring at a time when visibility of lights is poor and he is not quite sure of himself (A 161). He stated that light vessels in anchoring need pay no attention to the shoal but that deeper draft vessels should be placed further down (A 161). No pilot suggested that in order to avoid the shoal it was necessary to invade the intersection of the two ranges or otherwise move toward the Oregon shore. Captain Grunstad stated that a pilot anchoring on the red range would be safe from the shoal (A 186).

It will be remembered that these pilots had in mind anchorage opposite Columbia City Front or below that light and not above it. No pilot testified that he or any other pilot ever anchored above the light and there is no testimony that a vessel was ever anchored above the light other than the Boston Maru. *No pilot testified that the shoal had ever interfered at any stage of the water with the use of the customary anchorage.*

Dalby said that in anchoring he never paid any attention to the shoal (A 155). It will be remembered that he anchored on the red range by night a little below Columbia City Front.

Sullivan said he never heard of a vessel aground on the shoal and that pilots anchor well out from the Oregon side to keep away from the channel and ranges (A 231).



## NOTHING DONE AFTER ANCHORING

We do not charge that the Boston did not maintain an anchor watch but do charge that an anchor watch which does nothing when something should be done is equivalent to no watch at all. If the Boston had been anchored at the exact position in which she lay at the instant of the collision and had been locked in this position by the use of a stern anchor we think the judgment of the trial court would have been different, yet in contemplation of law if that position would have been improper the night before it was improper at the instant of the collision. Whether the Boston lay there 6 seconds or 6 years would have been altogether immaterial if the position was improper. In fact the testimony of Chiga, Berry, Swenson, Gillette and Gildez as to her angle just before, during and just after the collision indicates that her stern was actually swinging either up or down stream at the instant the collision occurred.

On board the Boston nothing was done about it. The pilot was not awakened; no stand-by bell was given to the engine room; no stern anchor was let go to stop the swinging; no danger signal was given to the West Keats. Any or all of these things could have been done to get her out of her deceptive and dangerous position, since she started swinging with the tide thirty-four minutes before the collision, according to Chiga (A 566).

Captain Gildez on direct said that he instructed them to awaken him (A 312):

A. About one-two o'clock we were to leave.

What actually awakened him was the rolling caused by the collision. On cross examination he modified this statement (A 337):

Q. What instruction did you give the Japanese officers with respect to calling you?

A. Told them to call me if anything happened is about I all said.

Q. That is about all you said?

A. Yes.

Q. Did you tell them to call you in case of fog?

A. No, sir.

Q. You didn't use the word fog?

A. No, sir.

Q. Did you tell them to call you in case the vessel swung with the tide?

A. No, sir.

Q. Did you tell them to call you in case the vessel swung over to the Oregon side?

A. No, sir.

Q. Do you ordinarily, on anchoring vessels, Captain, go to sleep while the vessel is lying at anchor?

A. Yes.

Q. In a place where there is no more anchorage room than there is here?

A. Yes, sir.

#### BOSTON MARU'S POSITION AT COLLISION CONTROLLING

There is no room for the suggestion that the Boston as originally anchored or as she was lying when the bearings were taken was placed where the collision would not have occurred. Those positions are stated and described only to show how the Boston came to be where she was when the collision occurred.

Her position at the instant of the collision, as nearly as it can be ascertained, is all important, and the case must be considered on that basis alone. It is exactly as if the Boston were originally anchored and locked in that position. It matters not how long the Boston was there. The cases to be cited tend to condemn her position at the instant of the collision and we do not know of authorities to the contrary. We are fully convinced that to uphold the position of the Boston at the time of the collision would be to disregard the plain word of Congress.

## AUTHORITIES ON ANCHORAGE

Section 15 of the Rivers and Harbors Appropriation Act of March 3, 1899, 30 Stat. 1152, 9 FSA 60 USCS 9920, provides as follows:

“That it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.”

*The Europe*, CCA 9th, 190 Fed. 475.

This case emphasizes that the statute does not impose an absolute or unreasonable prohibition of the use of waterways for anchoring. This doctrine is correct within limitations. The limitations are, as pointed out in other circuits, that anchorage must be such as not to *obstruct, hinder, interrupt, embarrass, or deceive other navigators, or make their passage difficult, cause them to maneuver sharply, or interfere with the use of proper channels or the range lights marking them more than necessities require.* These limitations to the doctrine of *The Europe* cannot be overlooked since they are implied in the wording of the statute itself. The test is not whether the moving vessel could get by. It is whether the moving vessel is unduly impeded, obstructed, deceived, or caused to maneuver sharply.

The cases which follow discuss the several faults which we claim were committed by the Boston.

1. She lay across the intersection of the Government established ranges and in the ordinary line of navigation from one range to the other.

2. Her amidships was 400 or more feet above and 700 or more feet to the Oregon side of the customary anchorage.

3. Her stern was so close to the Oregon shore as not to admit of passageway for the West Keats between her and that shore although the channel designated by the establishment of the ranges and by custom lay along this shore.

4. The river off Columbia City is divided by establishment of the ranges and by custom of the pilots in two parts, a channel up and down the Oregon side and an anchorage on the Washington side below the town. The Boston disregarded the anchorage and placed herself squarely across the channel.

5. Her position at the time of the collision was such as to deceive a pilot navigating down river as to her location. The natural assumption was that she was in the anchorage and not in the channel. This assumption was made more reasonable by the bend in the river at that point, by the high Oregon bank tending to shade that portion of the river, and by the darkness of the night in question which permitted vision only of lights and little or none of the shore lines and water at the point.

6. The Boston did nothing after she started to swing with the tide to protect other shipping by use of either her stern anchor, engines or whistle.

*The Caldy*, 153 Fed. 837.

The Caldy was held improperly anchored since she was lying directly across the channel. Her stem was about 114 feet northward of mid-channel and her stern not more than 100 feet from the southern bank. It was argued that other vessels had successfully passed her both before and after the collision.

. . . for as she was anchored some distance north of mid-channel, the wind from the north holding her across the channel, she naturally caused other vessels entitled to the southern side to fear to attempt to pass to the north because of the unknown length of her anchor chain, and she rendered the southern side at least hazardous, *as was demonstrated by the three vessels that did succeed with difficulty in passing and by the one that made the effort and failed.*

*The Hilton*, 213 Fed. 997, 1000.

The Hilton's anchorage was held improper.

. . . There was certainly no necessity for her so monopolizing the channel either because of the lack of other location, a crowded harbor, or of existing weather or other conditions. Moreover, she should, if necessary so to anchor where she did, have used both her

stern and bow anchors in order to keep the vessel parallel to, or nearly with, instead of across, the channel.

*The Itasca*, 117 Fed. 885.

*The Bern*, (2nd C. C. A.) 255 F. 325.

#### ANCHORAGE IN VIOLATION OF CUSTOM OR REGULATION

Many cases held that anchorage contrary to local custom or regulation is in violation of the statute. It matters not whether it is custom or regulation which is departed from.

*Culbertson vs. Shaw*, 18 How. 584, 586.

This was a moorage case in which both custom and regulation were charged.

Whether a rule on this subject be established by an ordinance or general usage is immaterial; if the regulation has been so made as to be generally known.

*United States vs. St. Louis Co.*, 184 U. S. 247.

Government war vessels anchored without notifying the Harbor Master as required by New Orleans ordinances and in an unusual place. The collision occurred before the passage of the statute in question. Holding the anchorage improper, the Supreme Court said:

It is negligence for a vessel to moor so near the entrance to a harbor that shipping,

entering in stress of weather, is liable to become embarrassed by its presence; . . .

*The Sanford-Strathleven*, 203 Fed. 331, 213 Fed. 975.

Anchorage of the Strathleven was held improper.

. . . The regulations of the Harbor Commissioners in so many words forbid vessels to anchor in the channel; this prohibition impliedly extends to anchoring so as to obstruct the channel. The court below finds that neither authority nor usage has designated any specific anchorage grounds, and the implication from much that is said in the learned and elaborate opinion is that the port regulations referred to have been but indifferently enforced or obeyed. *Suffice it on this point to say that vessels anchoring in places forbidden by local law or custom must take the consequences of their own improper acts.* *The Clarita and the Clara*, 23 Wall. 1, 23 L. Ed. 146; *United States v. St. Louis Transportation Co.*, 184 U. S. 255, 22 Sup. Ct. 350, 46 L. Ed. 520; *Culbertson v. The Southern Bell*, 18 How. 586, 15 L. Ed. 493; *The Annasona* (D. C.) 166 Fed. 803.

*Graves vs. Lake Michigan Ferry Co.*, 183 Fed. 378.

. . . The testimony is conflicting whether anchorage off Sherwood Point was or was not customary or deemed safe or unsafe, within or without the usual course of navigation;



but the evidence is convincing, if not undisputed, that the other side of Sturgeon Bay affords both abundant and better anchorage ground for vessels; and the master of the Mingo, who fixed the anchorage place, had not visited Sturgeon Bay for ten years prior to his present trip. We believe both masters were mindful of a convenient place to be taken in tow, and not of better anchorage ground to leave clearance for navigation, and that the testimony is sufficient to support the finding that the Wilson was at fault, in the following particulars: Their anchorage in the fairway, for days and nights, if not negligence *per se*, was an obstruction without reasonable cause—and possible menace in darkness or thick weather—to free passage of vessels on a much frequented course. While the testimony is conflicting (as above mentioned) whether it was a reasonable and customary for vessels to lie at anchor off Sherwood Point, it is far from satisfactory that it was either reasonable or usual to thus anchor in the course, or that navigators were chargeable with notice that such anchorage was to be expected.

*The Admiral Cecille, Compagnie Francaise vs. Burley*, 134 Fed. 673, 676.

. . . Both locations are unnecessarily near to the track of vessels entering and leaving the waterway, and this is so because there is in the harbor of Tacoma an abundance of room for anchorage at a safe distance from the track of vessels coming into and leaving the wharves and docks; and the circumstances

above narrated do not, in my opinion, afford a reasonable excuse for the action of the tug-boat manager in anchoring the bark within the prohibited zone. He knowingly violated a reasonable regulation prescribed by lawful authority, and for the consequences of his act while in the service of the bark as a local pilot the bark is liable to respond in damages.

#### ANCHORAGE ON OR NEAR RANGE WRONGFUL

*City of Birmingham*, 138 Fed. 559.

We cannot resist the conclusion that if the bow of the dredge as she lay on the bottom of the river had been turned so that she was parallel with the *range line*, her distance from the line would then have approximated closely to that distance prior to the collision . . . . The district judge found that the dredge was about 200 feet south of the center line of the channel and we are satisfied that this conclusion is substantially correct. The overwhelming weight of testimony establishes the fact that she could not have been nearer than 150 feet to the center line, or farther than 225 feet from it, and we think this finding sufficiently presents the remaining question, namely, was the dredge at fault in anchoring where she did?

(559)

The act of March 3, 1899, c. 425, 30 Stat. 1152, Par. 15 (U. S. Comp. St. 1901, p. 3543), provides "that it shall be unlawful to tie up or anchor vessels or other craft in navigable

channels in such a manner as to prevent or obstruct the passage of other vessels or craft." It seems to us that a dredge anchored at night 200 feet from the center of the channel of a narrow river, where a seven-foot tide ebbs and flows and within half a mile of a sharp bend, is within the mischief if not within the strict letter of the statute. Such a craft does not prevent navigation in the sense of stopping it altogether, but by crowding all navigation practically into the northern half of the channel she obstructs the passage of other vessels; that is, she hinders, impedes, embarrasses and interrupts their progress.

. . . . .

. . . Placing the dredge within 200 feet of the center line added a new and wholly unnecessary complication to a problem already sufficiently perplexing. The courts should not encourage laxity and shiftlessness by rewarding a master who places his craft in a position of danger simply because it is too much trouble to place her in a position of safety. Where human life and property are at stake, the consequences flowing from a dereliction of duty are so momentous that the courts should not permit considerations based upon convenience alone to be used as an excuse by one who failed to take every reasonable precaution to insure safety. A finding in favor of the dredge will place a premium on carelessness.

*The Milligan*, 12 Fed. 338, 340.

*While the sloop was not lying upon the range of lights, she was dangerously near it,*

—*subjecting passing vessels to the exercise of unusual care.* The position was not forced upon her; she might have anchored lower down, (before reaching it, or by floating back when the tide turned.) She would thus have been out of the way, and out of danger. Her anchorage so near the center of a narrow channel was inexcusable.

*The Belfast*, 226 Fed. 362.

I accordingly find that the *Wayne*, when struck, was lying at anchor nearly in the center of the channel, in the commonly used part thereof, *a short distance westerly in a line about parallel with the South Boston range from where she sank.* She was swinging almost squarely across the channel, and in connection with other barges anchored near her, but farther north, so obstructed the northerly half of the channel as to make navigation through it impracticable.

The determination of the place where the collision occurred disposes of the *Wayne's* contention that she was free from fault. She had taken no adequate care as to her place of anchorage. She lay a considerable distance outside the prescribed anchorage ground, nearly in the center of a channel which has been held by this court to be a narrow one (see the *Schooner Baxter*, *The Vera*, and the *Melrose*, 226 Fed. 369), where she had no right to be.

The law applicable to the foregoing situation has been so fully covered in other cases

that extended discussion of it here is unnecessary. See *The Vera and The Melrose*, 226 Fed. 369, Dodge, J., Sept. 14, 1912; *The Georgia* (D. C.) 208 Fed. 635, 644, *The City of Birmingham*, 138 Fed. 555, 71 C. C. A. 115; *The Strathleven*, 213 Fed. 975, 130 C. C. A. 381; *The Hilton* (D. C.) 213 Fed. 997. *The Wayne* was "obstructing" the passage of vessels in the channel, as that word is defined in *The City of Birmingham*, *supra*.

"An anchored vessel, that can be clearly sighted and readily avoided by a slight change of wheel, may not be an obstruction, but when she can with difficulty be sighted, and when she requires other vessels on their usual courses to stop or to maneuver sharply, she may be considered an obstruction." Brown, J., *The Georgia*, *supra*.

. . . While she was not directly on the South Boston range, she was so near it as to interfere with and imperil vessels following that course in the ordinary way.

#### LACK OF PRECAUTION BY ANCHORED VESSEL

*The John H. Starin*, 122 Fed. 236.

The act of March 3, 1899, c. 425, 30 Stat. 1152, Par. 15 (U. S. Comp. St. 1901, p. 3543), provides, "That it shall be unlawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." The courts have frequently held that the precautions taken by a vessel voluntarily

anchoring in a dangerous position should be commensurate with the perils assumed. *The Clara*, 102 U. S. 200, 26 L. Ed. 145; *The Sapphire*, 11 Wall. 170, 20 L. Ed. 127; *The Worthington* (D. C.) 19 Fed. 836; *Toss vs. Trans. Co.*, 43 C. C. A. 538, 104 Fed. 3302; *The Ogemaw* (D. C.) 32 Fed. 919, 926.

*The Ogemaw*, 32 Fed. 919, 926.

Anchorage of the *Richards* was held proper. The *Ogemaw* was in collision with her on account of an attempt to cross her bows. The *Ogemaw* was of course held at fault. The court, however, held the *Richards* also at fault for failing to take seasonable steps to prevent the collision.

The second mate knew there was danger when the *Ogemaw* was abreast of the *Richards*, for he says he hailed the men on the deck of the *Ogemaw*, and told them to keep away, and that he hailed the barges in tow, warning them to keep their wheels hard a-port. No effort was made to run out more anchor chain, thus allowing the vessel to drop down the stream with the current. In fact, nothing was done on the *Richards* to avoid the collision, except to hail the passing vessels, and put the wheel of the *Richards* to port when the collision was unavoidable. More effective measures might have been taken to avert the disaster which resulted.

SUMMARY OF CONTENTIONS RESPECTING BOSTON  
MARU

The above authorities we think condemn the position of the Boston at the time of the collision on several different grounds. In the first place she was there through two accidents. Gildez tried to put her opposite Columbia City Front but got her more than 400 feet up stream. Also he tried to put her 600 or 700 feet out and got her about 900 feet out. We think the testimony clearly condemns the practice of anchoring in that part of the river by merely guessing the distance out from a light on the shore, except in cases of fog. Gildez guessed twice and was wrong both times. This alone would appear to condemn the anchorage.

But at the time of the collision the amidships of the Boston was at least 700 feet westerly and over 400 feet southerly from an anchorage ground established by testimony of all the pilots as the customary anchorage. There was no suggestion of lack of uniformity or general knowledge of the practice of anchoring over to the Washington shore on one or another of the yellow lines. That locality had been used for anchorage for a long time. Captain Allyn, one of respondents own witnesses, said they had been anchoring there ever since he had been in the pilot business. Captain Gildez pretended that he did not know of this custom but admitted he

had always passed vessels anchored there on the Oregon side of them. If he did not know of the custom, in view of the testimony concerning it, his ignorance was inexcusable.

Let us pause to comment on the effect of placing the Boston over 400 feet above Columbia City Front. The court will remember that no pilot testified he had ever seen or heard of a vessel anchored above this light other than the Boston Maru. The majority of the pilots testifying said that they anchored opposite the light although two or three of them said they went below it, especially with large vessels. All of the testimony on custom tended to place the anchorage opposite or below the light. Gildez tried to anchor opposite it but blundered in turning three-quarters of the way around a circle and got 400 feet above it.

Now suppose Gildez had guessed right and had got opposite the light but no further out from the general contour of the Oregon shore. By using dividers on both the large and small charts the Court can determine about how far his stern would have been from the six fathom line. Leaving about twice as much slack in the chain as Hickson has left, the distance of the Boston's stern from the six fathom line would have been more than 200 feet instead of about 50 feet as appears to have been the actual situation. The conclusion under the testimony is ir-



resistible that if Gildez had anchored opposite the light and no further out than he did from the light from which he estimated the distance, the Keats would have passed by safely.

Again, the Boston at the time of the collision was squarely across the main ship channel at the intersection of two ranges. A more dangerous and deceptive position could hardly have been selected. If the Boston had been across a range extending up river Berry could have appraised her location at a considerable distance and governed himself accordingly. But she was partly around a turn from the St. Helens Bar Range and Berry could not head toward her until after leaving that range. The high Oregon bank made accurate vision more difficult. All these things Gildez knew or should have known. A pilot who disregards a customary and comfortable anchorage to place his vessel across a channel marked by ranges is doubly negligent when he selects a point midway between ranges where a high bank and a turn both tend to obscure her position from craft lawfully using the ranges.

We can think of no possible excuse short of illness for a pilot lying in bed asleep when his vessel is lying across the regular channel at night. There are perhaps circumstances under which Gildez might have lawfully placed his anchor where he did—under which indeed he might conceivably have placed and locked the Boston ex-

actly where she was at the time of the collision. But can we imagine excusing a pilot's being asleep with his vessel in that precarious position?

The stern of the Boston was close to the Oregon shore. Testimony as to the anchorage coupled with the testimony as to the starboard helm of the Keats and the suction establishes this beyond question. Yet the routine manner of passing vessels at anchor off Columbia City is between them and the Oregon shore. This alone we think establishes the fault of the Boston in view of the wide space for anchorage at the point.

When the Boston started to swing across the intersection of the ranges it would have been comparatively simple to have thrown out a stern anchor or to have brought her main engines in commission to keep her out of a dangerous locality. She had thirty-four minutes from the time the current started to back up stream in which to do something, yet nothing was done. The fault here was that of second mate Chiga or Captain Gildez or both. While Gildez is indefinite as to instructions to Chiga it would appear that he left instructions to call him if anything happened, leaving him to judge what "anything" meant. During the last seven minutes before the collision it should have been known on board the Boston that the West Keats was approaching and it should have been assumed that she was follow-

ing the usual channel. The precarious and dangerous position into which the Boston was drifting should also have been known. It would have been easy to warn the West Keats by whistles, bells or whatnot and a warning given soon enough would have avoided the collision. Yet nothing was done either to keep the Boston from drifting into her dangerous position or to get her out of it or to give warning.

If Gildez had deliberately placed and locked the Boston in the position she held at the time of the collision his misconduct would have been so gross as to call for severe penalties. Since our libel does not ask anything in the way of punitive damages this case must be considered exactly as if he had done so. What more need be said to condemn the anchorage. We feel that the fault of the Boston is established far beyond a reasonable doubt. To uphold the anchorage is to scuttle the statute.

#### BURDEN OF PROOF ON BOSTON MARU

Assuming wrongful anchorage on the part of the Boston it is clear under the authorities that the burden of proof is upon her to show that any fault of the Keats contributed to the accident. There is a rule finding much support and some dissent in the authorities that where a collision occurs between a vessel at anchor and another in motion the presumption of negligence is upon

the moving vessel, 11 C. J. 1170-80. For a variety of reasons, however, where the anchored vessel is improperly anchored she must in order to divide damages show by a preponderance of testimony that the moving vessel was at fault.

*The Clara*, 102 U. S. 200, 202.

The *Newell* was at anchor and the *Clara* ran into her. The court held the *Newell* solely at fault and exonerated the *Clara*.

Looking at the case in the light of the findings of fact, no fault whatsoever, of omission or commission, is imputable to the "*Clara*." It is true it was her duty, under the circumstances, to enter the breakwater and proceed to her anchorage with the greatest care and circumspection. *Culbertson v. Shaw*, 18 How. 584.

*Whether there was any failure on her part to comply with this requirement is not shown. But the maxim applies Quod non apparet non est. The fact not appearing is presumed not to exist.* The libellants brought the case into court and thus assumed the affirmative. The burden or proof rested primarily upon them. If in this or in any other respect there was delinquency on the part of the respondents, it was for the libellants to prove it. As the case is presented to us in the record, the "*Clara*" must be held entirely blameless.

*The John H. Starin*, 122 Fed. 236.

The Burney was anchored in the middle of an 800 foot channel and was run into by the Starin. The court held the Gurney solely at fault.

For these reasons we conclude that the Gurney was at fault and that the fault was the proximate cause of the collision.

*Having thus found sufficient cause for the collision it is not necessary to pursue the discussion further.* The Gurney's negligence having been clearly proved it is necessary for her to establish the Starin's fault by proof of equal cogancy. *The City of New York*, 147 U. S. 72, 85, 13 Sup. Ct. 211, 37 L. Ed. 84.

*The Prudence*, 212 Fed. 537, 540.

The court held the Hodges solely at fault for improper anchorage (540).

. . . From all the evidence I cannot see how the Hodges could have been anchored for the night in a place where she was more likely to obstruct the navigation of the river by tugs towing other craft. If she had gone below the ranges, she would have been in an entirely safe position because the vessels upon leaving the ranges steered to starboard, and she would thus have been entirely out of the way of navigation.

. . . *The fault of the libellant in anchoring in that position overcomes the presumption in favor of an anchored vessel when struck by*

a vessel in motion. The schooner was anchored in an improper place, and her owner must take the consequences which fairly result from his own act.

*The Miner*, 260 Fed. 901, C. C. A. 6th.

The Halcyon had been moored at a dock for more than a year at the same place where she was when the collision occurred. The master of the moving tug had been many times up and down the river and must have known her exact location. The court held the moorage improper and also held that the tug was at fault.

. . . The vessel at anchor being in a proper place in case of collision, the presumption of fault lies against the vessel in motion; *but this presumption does not obtain when the anchored vessel was where she should not have been.* The prima facie fault of the anchored vessel may be overcome by competent proof that its anchorage could not have been the sole cause of the collision. In such circumstance the burden is with the anchored vessel to meet and overturn the presumption by proof of actual fault or want of reasonable care on the part of the moving vessel. *The Europe* (D. C.) 175 Fed. 596, and cases cited.

We think the court below was warranted in decreeing that the houseboat Halcyon was moored at a dangerous place, and affirmance must follow as to the non-liability of the tug J. L. Miner, unless it clearly appears from a

decided weight of the evidence that the tug was also at fault. We have carefully considered the evidence and exhibits thereto, and we cannot escape the conclusion that it does so clearly appear.

*The Europe*, 175 Fed. 596, 190 Fed. 475.

We believe that the rule now contended for is already adopted in this Circuit. The opinion of Judge Wolverton affirmed by the Circuit Court of Appeals is a fine illustration of the care and depth of the late jurist. We quote (175 Fed. 607):

. . . The rule is, as it respects a vessel at anchor in the fairway, that she must take precautions commensurate with the danger she presents to shipping. If the danger is great, the care to prevent collision and accident from other ships navigating the water should be correspondingly great. If of lesser moment, the precaution may be diminished accordingly. *The John H. Starin*, 122 Fed. 236, 58 C. C. A. 600.

It is a rule that a moving vessel must keep out of the way of one at anchor. This because the one at anchor is practically helpless, and is usually so conditioned as to be unable to relieve herself readily in stress of emergency. The rule is applied with great strictness, the vessel at anchor being in a proper place. In such case the presumption of fault lies against the vessel in motion. *This presumption, however, does not obtain where the anchored vessel was where she should not have been.* A vessel anchored

where she should not be must take the consequences of her own improper act. But in any event, whether she be in a proper place or not, or whether properly or improperly anchored, the moving vessel must avoid her, if it be reasonably practicable and consistent with her own safety. In support of these several propositions see 1 Parsons on Shipping, 573, 574; *The Clarita and The Clara*, 23 Wall. 1, 23 L. Ed. 146; *The Virginia Miller*, 76 Fed. 877, 22 C. C. A. 597; *Ross v. Merchants' & Miners' Transp. Co.*, 104 Fed. 302, 43 C. C. A. 538.

*The Belfast*, 226 Fed. 366.

The *Wayne* was improperly anchored and the *Belfast* was outbound on the left side of the channel.

. . . Article 24 of the Inland Navigation Rules is a rule of the road and defines the respective rights of moving vessels in narrow channels. As against a vessel entering through this channel, the *Belfast* was bound to keep her starboard side of it. Her rights on the other side of the channel were inferior to those of the entering vessel. *But as against a vessel not proceeding, but wrongfully lying at anchor there, the Belfast's right as a traveling vessel was superior in any part of the channel.* *The John H. Starin*, 122 Fed. 236, 58 C. C. A. 600.

*Graves vs. Lake Michigan Co.*, 183 Fed. 378,  
C. C. A. 7th.



The court held the Wilson improperly anchored and the vessel improperly navigated.

In admiralty the rule is settled: That the moving vessel must keep away from a vessel properly anchored and lighted, and collision in such cases raises a presumption of fault against the vessel in motion, placing upon her the burden of exonerating herself from blame for the collision. The Virginia Ehrman and the Agnese, 97 U. S. 309, 315, 24 L. Ed. 890; The Oregon, 158 U. S. 186, 192, 15 Sup. Ct. 804, 39 L. Ed. 943, and cases cited. *The authorities are numerous, however, that the general law of the sea becomes applicable to such collisions, when the anchored vessel is improperly moored in the fairway or otherwise appears at fault.* (Ross v. Merch. & Miners' Transp. Co., 104 Fed. 302, 303, 43 C. C. A. 538; City of Birmingham, 138 Fed. 555, 559, 71 C. C. A. 115; The Scioto, Fed. Cas. No. 12,508, 2 Ware. 360, and notes); and we believe it to be unquestionable that evidence of negligence on the part of the anchored vessel, either as sole or contributory cause of the collision, establishes a case within the general rules of admiralty as to liability for damages.

*The Sanford-Strathleven*, 203 Fed. 331, 334, 213 Fed. 975.

The court held the Strathleven's anchorage was improper and the Sanford was improperly navigated. The District Court had held the Strathleven solely at fault. We quote from the

District Court's statement of the law, bearing in mind that he was reversed on the facts. The higher court did not discuss the question of burden of proof.

For a collision thus brought about, she is not entitled to, and cannot claim, the privileges of an anchored vessel, as between herself and other shipping lawfully using the harbor, which had no reason to anticipate danger arising from the unusual and improper character of her movements. *Culbertson v. The Southern Belle*, 18 How. 584, 587, 15 L. Ed. 493; *The Clara*, 102 U. S. 200, 202, 26 L. Ed. 145; *United States v. Transportation Co.*, 184 U. S. 247, 255, 22 Sup. Ct. 350, 56 L. Ed. 520; *Marsden on Marine Collisions* (6th Ed.) 479, and cases cited; *Spencer on Marine Collisions*, Pars. 99, 106; *Hughes on Admiralty*, 261, 262.

The obstruction of the channel, in the view taken by the court of this case, was in plain contravention as well of the state statutes and harbor rules and regulations applicable to the waters in question, as the federal statute on the subject.

We think the evidence irresistibly condemns the anchorage of the *Boston* at the time of the collision as improper. Assuming we are only partly correct and a preponderance of the evidence shows the *Boston* at fault then we contend and believe the above authorities fully demonstrate that the burden of proof falls upon the

Boston to show by a clear preponderance of testimony that the Keats was also at fault. If she has done so we think the damage should be divided. If she has not done so we think the entire cost should be borne by the Boston.

There are several reasons why this burden is upon the Boston if her anchorage was improper.

1. The owners of the Boston are libelants and to get affirmative relief and damages they must prove negligence on the part of the West Keats. This is fundamental. The owners of the West Keats are also libelants and it is conceded that they must show fault on the part of the Boston to recover. The rule works both ways.

2. The rule that there is a presumption of negligence against a moving vessel in favor of an anchored vessel applies only when the latter is properly anchored.

3. The Boston at the time of the collision was violating a statute of the United States designed to prevent collisions, namely, the Act of March 3, 1899, making it unlawful to tie up or anchor vessels in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft.

4. The fault of the Boston commenced at an earlier time than that charged against the Keats and continued to the time of the collision. *The*

*Nereus*, 23 Fed. 448. The *Nereus* and *Jamaica* were in collision through misunderstanding of signals. As they were headed toward the collision the *Nereus* gave another signal for the *Jamaica* to go astern and claimed that because the *Jamaica* did not obey, the entire fault was hers. The court said that it was not sufficiently shown that the *Jamaica* could thus have avoided the collision and that the faults of both vessels were proximate. Judge Brown said:

In applying the above rule in particular cases, whenever it is sought to relieve a vessel from the consequences of a previous fault tending to produce a collision, the burden of proof is certainly upon her. She must satisfy the court beyond any reasonable doubt, not merely that the collision, notwithstanding the previous fault, might possibly have been avoided by the other vessel, but that the mode of avoiding it suggested was timely, and would have been adopted, under the particular circumstances, by a pilot of ordinary skill and judgment.

5. The fault of the *Boston Maru* is sufficient in itself to account for the collision and therefore since the *Boston* charges that fault on the part of the *West Keats* was a proximate cause the burden is on the *Boston* to prove the charge.

*The Oregon*, 158 U. S. 186, 197.

The *Oregon* through negligence of its officers was in collision with a vessel properly anchored.

Charges were made respecting the lights of the anchored vessel. The court said that the negligence of the Oregon was proved by a preponderance of testimony and was sufficient to account for the collision, consequently the burden was on her to show that the anchored vessel was at fault. In the cases cited above the same rule was applied in favor of moving vessels against vessels shown by a preponderance of testimony to have been improperly anchored. This rule is most clearly stated in *The John H. Starin*, *The Clara* and by Judge Wolverton in *The Europe*, all supra.

#### THE WEST KEATS

There is no dispute in the record as to what Captain Berry, pilot of the West Keats, did. The dispute as to the conduct of the West Keats takes the form of speculations and arguments as to what Berry might have done that he did not do. Berry's testimony and the depositions of Second Officer Gillette, Captain Swenson, Chief Engineer Bergreth, Second Assistant Jett, and Quartermaster Gidlof are undisputed in the record and are substantially harmonious.

Captain Berry was 48 years old at the time of the trial. Thirty of these years he had spent working on the Columbia River as deck hand, mate, master and pilot. Eighteen years before the collision he had received his unlimited Columbia River Pilot's license from the Govern-

ment. He became a member of the Pilots' Association in 1921 and received his state branch license in 1922 (A 27, 28).

The Keats is a single screw steel steamship of 410.5 feet length, 54.2 feet beam and 8,800 dead weight tons. Berry went aboard her at Terminal 4 of the Port of Portland at St. Johns in the evening of October 25th. At about 11:10 P. M., fully loaded and drawing 23 feet eight inches forward and 25 feet 8 inches aft (A 393), he took her out of the terminal and headed her down river. On entering the Columbia River her engines were set at full speed ahead where they remained until one minute before the collision. Approaching Columbia City she passed Warrior Rock, made the turn at the head of the St. Helens jetty, got on the St. Helens Bar Range, and came down the narrow dredged channel alongside the jetty.

The uncontradicted testimony of several witnesses will advise the court of some very pertinent facts concerning the handling of the Keats and other vessels of her class.

*The Keats steers best at full speed ahead.* The faster turning of the propeller sends a stronger flow of water backward past the rudder. Moving ahead with her engines stopped she is not readily dirigible.

*The Keats backs to port.* When her engines are backing her stern is thrown to the port and

her bow to starboard regardless of what position her rudder may be in.

*The Keats when turning on a port or starboard helm tends to sag, that is, she turns slowly at first and the longer the helm is held in position the sharper becomes her angle of curve.*

*In order to stop the West Keats it would be usual to take nearly two miles and nearly half an hour to the maneuver. It could be done more quickly, especially in a wide basin, but the quicker method would not be resorted to except in necessity.*

*With her engines stopped, if the vessel was moving full ahead, it would take her a long time to come to a halt and she would travel three or four miles in the process if kept straight ahead. But she would be more or less unmanagable.*

Accustomed as we landsmen are to four wheel brakes it is hard for us to realize the utterly different problems which confront a pilot operating thousands of tons of ship and cargo through the water with only a small propeller and a small rudder for power and steerage.

Doubts as to the speed of the Keats were set at rest by Gillette (A 409-410) who measured the nautical miles from the mouth of the Willamette to the point of collision and applied the same to

the time, showing an average speed of 8.84 nautical miles per hour. We may perhaps assume that her speed was greater at first when she had the aid of the current and gradually slackened as the rising tide first caused a slackening and stoppage of the current and later a slight upstream current. The one minute stoppage of the engines would affect her average speed for the total distance negligibly.

The night was very dark but not foggy. The sky was overcast with occasional light rains. Lights were clearly visible but the shore lines were practically invisible (A 95, 352). Shortly before and about the time of the collision Berry could see the dark line of the high bank on the Oregon shore but in a vague way. He says (A 114):

Q. Could you see the loom of the bank on the Oregon side about the time of the collision, about the time you were approaching the Boston Maru?

A. No, sir, you couldn't make out the shore to speak of at all. It was a dark bank along there, which looked very close, but you couldn't discern any trees or anything like that.

Q. You say you could see the bank?

A. Well, you could see a dark line along there.



Perhaps because of the shadow of the high Oregon bank testified to by several pilots Berry could see little or nothing of the water ahead of him as he tried to run between the Boston and the Oregon shore. He knew the shore was close and felt the effect of the suction but gauging the distance between the Columbia City Front Light, 200 feet back from the shore line, and the stern riding light of the Boston he thought until immediately before the collision that the distance was great enough (A 352).

As he continued down the St. Helens jetty, Berry saw ahead of him the group of lights constituting range, town and shore lights and the two riding lights of the Boston Maru. As he came to about the end of the jetty at the point marked with a cross he made the lights of the Boston, that is, recognized them to be the riding lights of a ship at anchor more or less across the river. He assumed her to be located at the regular anchorage.

He ran out the St. Helens Bar Range to a point about half a mile from the point of collision. This point is marked with a red cross. Here he turned to follow the usual channel down the Oregon shore in order to pick up the Columbia City Range below. He gave the order port a bit which was obeyed (A 107). The vessel answered and presently he gave the order steady (A 107).

He had now made the slight turn and was on a new course. It is a question whether at this distance from the Oregon shore he could see the same but he knew its general direction and was heading now not toward the shore but down the river. He could now see that the Boston was closer to the Oregon shore than he had assumed. He says speaking of the point at which he turned from the St. Helens Bar Range (A 108):

Q. When you arrived at the turning point, Captain, the place you marked as turning point, state what was your then opinion as to passing the Boston Maru to the Oregon side, as you had intended?

A. As I made my turn down the Oregon shore, I expected to pass the Boston Maru on the Oregon side, but in maybe getting a little further down I could see that she was perhaps pretty close to the Oregon shore.

Q. Was that at the time of making your turn by the St. Helens range, or afterwards?

A. After. I had made my turn expecting everything was all right.

But he did not realize how close the Boston was. Having left the range and proceeded down river for a distance he realized that he would have to go closer to the shore to pass the Boston and gave the order starboard a bit. The order was obeyed (A 108-109).

Now the steering gear of the Keats had been tested and found in order that same afternoon by the chief engineer, the first assistant and the chief officer (A 358, 364-365). Berry, Gillette and the quartermaster all testified that the vessel had answered her various helms properly coming down the river. *But it is the undisputed testimony of Berry and Gillette that she did not answer this last helm* (A 109, 421). The reason was apparent at once to Berry. She was so close to the bank that the suction prevented her answering (A 109). The Court will be advised by the undisputed testimony of several experts that a vessel traveling along a bank with shallow water on one side tends to "smell the bank," that is, her bow tends to turn away from the bank or her stern toward it. Under this starboard a bit helm the rudder tended to turn the vessel toward the Oregon bank but the suction tended to turn her head away from it and she kept going straight. Berry then ordered hard a-starboard, which order was obeyed (A 109). *The vessel did not answer. The helm remained hard over to starboard until after the collision.*

In reading Gillette's deposition parallel with Berry's testimony the court will find these orders and the bells to follow fully corroborated. Gillette took the times of the bells. The times were all short and are to be gauged by minutes and half minutes. For the convenience of the Court

we insert here a schedule of times and distances at the average speed:

8.84 nautical miles	per hour
2.21 nautical miles	15 minutes
.736 nautical miles	5 minutes
.147 nautical miles	1 minute
3000 feet	3 minutes 42 seconds
2000 feet	2 minutes 14 seconds
1000 feet	1 minute 7 seconds
14.9 feet	1 second
8.84 nautical miles	equals 10.17 land miles.

In the above data a nautical mile is figured at 6080 feet.

Very shortly after the hard a-starboard order Berry ordered the engines stopped and the order was obeyed. Gillette took the time which was 1:43 A. M. October 26th. The collision occurred at 1:44 A. M. At 1:45 A. M. after moving far enough along to be clear of the Boston, Berry ordered full astern. He made an unusually short stop and turn in the wide river at that point, having signalled Dalby on the Siersted to pass to port, proceeded up and stood by as required by law.

These are the facts about the conduct of the Keats. They are undisputed in the record. The rest of that part of the record touching the Keats relates to speculations and arguments as to what Berry should or should not have done. We con-

tend that there is no direct evidence in the record tending to show that any specific thing Berry did was negligent, and that the preponderance of testimony was that there is nothing he could reasonably have been expected to do that he did not do to avoid the collision.

Berry brought the West Keats down the usual navigating channel. He made the lights of the Boston when a little more than a mile distant. There was no evidence that he should have made them earlier. At the time he assumed that she was in the customary anchorage. There was no evidence tending to cast doubt on the reasonableness of this assumption.

The court will note the narrow angle subtended by a line from the amidships of the Boston to the regular anchorage and will also remember that the Boston was not straight ahead of Berry but partly around the bend.

There was no evidence tending to show that slowing, stopping or backing the engines of the West Keats would at any time have been practical, helpful or even safe.

The only question is whether Captain Berry should have turned out and passed on the Washington side of the Boston at the time he learned, or at the time he should have learned, that the Boston was too close to the Oregon shore for

safe passage. We invite particular attention to the cross examination by the trial court of Captain Sandstrom on this question. (A 163-167). The captain took a point on the chart 2150 feet from the place of collision. At that point he said Berry could tell something about the location of the Boston but would probably conclude that there was room enough for safe passage. He added, however, that a turn at that point to pass on the Washington side would be maneuvering sharply and dangerously.

We think that in this questioning of Sandstrom the trial court reached the heart of the case as far as the conduct of Berry was concerned. There was some little difference of opinion among the pilots but in the main they were substantially of the same view as Sandstrom. Grunstad spoke of the "shadow" cast by the Oregon shore (evidently meaning an area of deeper blackness and other pilots used the same word in the same connection) and the deceptive location of the anchored vessel. He thought that Berry might be able to tell at 2000 feet or closer if the night was darker (A 180-181) but that a turn at that distance would be abrupt and rather dangerous for a heavily loaded vessel. (A 181-182). Captain Sullivan refused to estimate the distance at which Berry might have known the location of the Boston (A 206-207). He said the only way of judging would be to estimate the space between the stern light of the Boston

and the front light of the Columbia City Range (A 208). He admitted (A 209) that a pilot might possibly come down within 1000 feet of the Boston and still reasonably think she was far enough out to be in a safe position. Sullivan was extremely indefinite on the matter of the turn. He first said this could be made at a 1000 feet but had in mind a situation in which the Keats was running directly at the amidships of the Boston (A 235-236). There being no evidence tending to show that this was the case he was asked to assume a situation in which the Keats was headed for the stern of the Boston. He said this turn could be made at a 1000 feet but that a pilot would not attempt it except under very extreme circumstances (A 242). Asked what order he would give to effect a turn of this kind he substantially refused to testify (A 243-244). McNelly was asked whether a turn of this kind could be made at 1500 feet but failed to answer yes or no. He said, however, that he thought the turn could be made at 2150 feet (A 293). Gildez said that in his opinion the turn could be made at 1200 feet, but admitted that it might result in a head on collision (A 315).

We think it a fair conclusion that the turn would have been impossible at a 1000 feet, substantially impossible or extremely dangerous at 1500 feet and sharp, unusual and dangerous at 2000 feet, or 2150 feet.

There is substantially no testimony in the record tending to show that Berry should have reasonably known at a distance of 2000 feet from the Boston that the passage between the stern of that vessel and the Oregon shore was dangerous. It is the substance of the testimony of the pilots that a turn at that distance to the Washington side would have been dangerous. Under these circumstances we think that Berry's conduct under a preponderance of the testimony is not shown to have been negligent. Indeed we believe that the preponderance is clearly the other way. As Berry approached nearer and nearer to the Boston the proximity of that vessel to the bank must have been more reasonably apparent to him but at the same time the difficulty of turning became greater. We think the record shows that a turn at any point after leaving the St. Helens Bar Range would have been fully as dangerous if not more so than the reasonable appearance of the passage between the Oregon shore and the Boston Maru.

For these reasons we believe that a preponderance of testimony upholds Berry's conduct and feel very sure that a preponderance does not condemn it. But it was contended before the trial court that Berry should have been on the other side of the river. This calls into question the



## NARROW CHANNEL RULE

It will be charged that the West Keats was proceeding in violation of Article 25 of the Inland Rules of Navigation as follows:

Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.

It will be said that the entire navigable portion of the river at this point was a narrow channel and it was the duty of the Keats to proceed on the right hand side.

The court will note the course the Keats would have taken if Berry had so navigated. On arriving about one mile from the point of collision Berry would have turned off the range to the right with the Washington shore about two-thirds of a mile away. He would have been without guiding lights except in so far as he might have sensed the appearance of the Columbia City group. At the point of crossing the Red Range he might have known his approximate position by looking back, but this would be only for an instant. Continuing down he would have cut through the usual anchorage ground and headed off into a black river below without guiding lights except possibly a couple of jetty lights a long distance away which he might or might not have been able to see. Arriving perhaps a

mile below the Columbia City range lights he would cross that range or perhaps be on it for a short distance to its end. There is not a scratch of evidence that any pilot ever navigated thus since establishment of the ranges. Such navigation would employ the St. Helens Bar Range only partly and the Columbia City Range little or none.

Respondent is contending for a construction of Article 25 which would make unlawful the use of the ranges established by governmental authority as aids to navigation. Surely it cannot be the intention of Congress that pilots should be prohibited, under pain of liability of their ships for damage from making use of aids established under congressional authority. It is clear that Article 25 must be construed to make lawful the use of range lights.

Article 25, because of the words "when safe and practicable" is always construed as flexible and is to be followed only "when safe and practicable."

*The Klatawaw*, (D. C. Wn.) 266 F 120.

*The G. S. Tice*, (2nd C. C. A.) 287 F 127.

*The Three Brothers*, (2nd C. C. A.) 170 F 48.

In fact, a local custom to pass to the left at a certain point due to peculiar conditions, has been upheld as lawful.

*Transfer No. 21*, (C. C. A. 2nd) 248 F 459.

But we contend that the Columbia River at this point is divided by governmental regulation (establishment of ranges) and custom into a ship channel on the Oregon side and an anchorage on the Washington side.

*The Bee*, 138 Fed. 303, 305.

The Circuit Court of Appeals of the second circuit affirmed the decision of the lower court reported at 127 Fed. 453, but corrected certain language of the lower court tending to hold that the entire upper New York Bay is a narrow channel within the meaning of Article 25. We are not familiar with upper New York Bay, but understand it consists of at least two channels, namely, the Main Ship Channel, and the Bay Ridge Channel. We understand further that between these channels are anchorage grounds and that the entire harbor is lined with docks, wharves and the like.

The court said (306):

Inextricable confusion would result if, under rule 25, an incoming vessel in the main ship channel were to be justified in keeping close to its red buoys, and at the same time were to be held in fault because she did not keep hundreds of feet further east on the starboard side of the middle line of the entire body of water. It is sufficient on this appeal to hold that in the case of a bay,

which is also a port or harbor, the entire body of navigable water is not to be considered a single narrow channel within rule 25, where through such bay there have been officially designated a plurality of channels (i. e., more than one channel) running substantially parallel with each other and in the same general direction as the main flow of the tide or current.

*The La Bretagne*, 179 Fed. 286.

The *La Bretagne* amplifies the decision in the *Bee* case. These two cases mean that in upper New York harbor where there are two channels more or less parallel and the whole harbor is as narrow as some waters which are construed to be narrow channels, each channel by itself is a narrow channel within the meaning of Article 25, and the whole harbor together is not such a narrow channel. In our case we have off Columbia City an expanse of deep water, wide for the Columbia River but as narrow as some waters which are construed to be narrow channels. This expanse of deep river has two distinct parts. The westward side marks the waters between the two ranges and has been designated by the establishment of these ranges as the ship channel for use especially at night. The eastward side of the river has been designated by usage and custom of the pilots as an anchorage ground. It stands to reason that a vessel going down the river, in order to comply with the narrow channel rule at this point, is not required by

Article 25 to leave the designated ship channel and invade the customary anchorage ground.

*George F. Randolph*, 200 Fed. 96.

The narrow channel rule undoubtedly applies to the main ship channel between Governor's Island on the east and Bedloe's and Ellis Islands, on the west. The *La Bretagne*, 179 Fed. 286, 102. C. C. A. 651. The Randolph claims, however, that the channel is the entire navigable channel, and not the space between the anchorage grounds, and upon that theory that the Randolph was about the middle of the channel, and, therefore, was not violating the narrow channel rule.

I cannot concur with this claim, especially as applicable to navigation in a fog. Rules and regulations have been officially promulgated for New York Harbor, and certain anchorage grounds and channels have been laid out and charted. It is a contradiction in terms to hold that vessels may rely upon those rules, and anchor in a place of presumed safety, and yet, because the anchorage grounds is a part of the channel, be subject, in a fog, to collision and damage. While this precise question seems not to have been decided in any reported case, this view is impliedly sustained in *The Mahonoy*, (D. C.) 126 Fed. 587, and I find nothing in the *C. W. Morse*, 171 Fed. 847, 88 C. C. A. 665, to the contrary.

It seems clear under these decisions that the narrow channel opposite Columbia City within the meaning of Article 25, includes only that part of the river designated by the range lights as the ship channel and does not include the entire river or the anchorage grounds.

We take it that this court will not condemn the West Keats in damages for using the range lights at night.

But there is another reason why, as we contend, Article 25 has nothing to do with this case. There was nothing coming up the river in sight and a wide and deep river below. Berry had only the Boston to look out for. He could lawfully pass by on either side consistent with regular usage and the circumstances. *Article 25 is a passing rule and does not relate directly to anchored vessels.* A moving vessel must keep out of the way of a vessel properly anchored, but has superior rights in any part of the channel to a vessel anchored so as to prevent or obstruct the passage of other vessels.

*The John H. Starin*, 122 Fed. 236, 239.

We have already cited this case. The Starin was in collision with the Gurney which was improperly anchored. One of the faults attributed to the Starin was failure to keep on the right hand side of the channel. The court said:

There being no pretense that this is a case of meeting vessels, we do not think negligence can be predicated of the fact that the *Starin* was navigating in the center of the channel.

*The Belfast*, 226 Fed. 362, 366.

We have also cited *The Belfast*. The *Wayne* was improperly anchored and the *Belfast* was on the left hand side of the channel. The court said (366):

Article 25 of the Inland Navigation Rules is a rule of the road and *defines the respective rights of moving vessels in narrow channels*. As against a vessel entering through this channel, the *Belfast* was bound to keep her starboard side of it. Her rights on the other side of the channel were inferior to those of the entering vessel. But as against a vessel not proceeding, but wrongfully lying at anchor there, the *Belfast's* right as a traveling vessel was superior in any part of the channel. *The John H. Starin*, 122 Fed. 236, 239, 58 C. C. A. 600.

#### PROXIMATE CAUSE AND LAST CLEAR CHANCE

Assuming that the position of the *Boston* at the time of the collision is to be condemned, was it a proximate cause of the collision? It must be shown that the fault of the *Boston* proximately caused or contributed to the accident and that the effect of her fault was not broken by some intervening cause in which she was not con-

cerned; that the collision would not have occurred but for (at least in part) her fault.

Under the facts it is perfectly plain that if she had been almost any place else in the river the collision would not have occurred.

We have cited many cases in which vessels at anchor were run into by moving vessels. In nearly all of these cases the anchored vessel was held at fault for improper anchorage. In some of them the moving vessel was also held at fault and the damages were divided. In none of them, however, is it suggested that the fault of improper anchorage is not proximate. All of these cases are authorities for the proposition that faults of the Boston both in anchoring badly and in failing to take proper precaution thereafter were proximate.

Furthermore the Boston had swung around about 180 degrees between the time of the anchorage and the time of the collision. The evidence indicates almost to a certainty that she was actually swinging at the instant of collision. From a time 34 minutes before the collision she started to become more and more a menace to navigation but did nothing to correct the situation, and even failed to warn the approaching West Keats of her dangerous position. Her fault continued and became more aggravated to the instant of the collision.



So far as we know the last clear chance doctrine of the common law is not a part of the admiralty jurisprudence. Perhaps one reason is the early adoption of the rule dividing damages in case of fault. The only rule of liability we have seen in the authorities is that where the fault of a vessel proximately causes or contributes to the damage, she is condemned in full or half damages as the case may be.

*The Yucatan*, 236 Fed. 436.

*American-Hawaiian Steamship Co. vs. King Coal Co.*, 11 Fed. 41.

We do not feel that we understand thoroughly the meaning of these decisions. Based upon them respondent argued in the District Court that even if it were conceded that the *Boston* was improperly anchored it does not follow that she should pay *any part* of the damage. Are the ancient admiralty rules being set aside in this circuit in favor of new doctrine? Where a vessel anchors or moors in violation of local custom or regulation or of the Act of Congress forbidding improper anchorage, does she escape liability to a negligent colliding vessel? Can she recover all of her damages from such vessel? If the moving vessel also is not at fault is she held anyway, or is there no recovery by either? Does it matter what the degree of negligence or improper conduct of the anchored vessel may be? Would it be the same if the anchored vessel deliberately

violated the statute? Or if her pilot carelessly violated it in order to be able to go to sleep earlier, as we believe was the situation in the present case? Would the rule be thus in the case of a vessel not anchored but drifting? We do not find the words "last clear chance" in either of these opinions but we confess doubt as to whether the court has not applied that common law doctrine in fact although not in name.

*The Yucatan.*

The court does not say that the state of Oregon was guilty of negligence in anchoring the cruiser Boston in the fairway. It appears to hold that such negligence, if any, would not be proximate. Yet we take it the collision would not have occurred but for such negligence, if any. True, there was another proximate cause in the negligence of the Yucatan. Frankly, we fail to see why both negligences, if the cruiser Boston was improperly anchored, did not contribute.

A similar situation was before the 6th Circuit in

*The Miner*, 260 Fed. 901.

The Halcyon had been improperly moored at the place of the collision for more than a year. The captain of the moving vessel had had abundant opportunity to observe her position and this fact bore heavily against him on the issue of his own conduct. But the Halcyon was not allowed to escape.

We confess we are disturbed by some of the language of *The Yucatan*, but not by the decision itself. The facts are distinguished from those of our case on the ground that the negligence of the cruiser Boston had spent itself. We understand the last clear chance doctrine does not apply in cases where the negligence of one party has spent itself. If I carelessly catch my foot in the rails so that I cannot move, my negligence is thereupon spent. If I sit or lie on the track at least partly awake and able to move my negligence remains active and proximate.

The Boston Maru went to anchor only the night before. From the time her anchor was cast until the collision she drifted around substantially 180 degrees. She was probably drifting at the time of the collision. Her anchor watch knew or should have known or should have been advised by the pilot that she was drifting across the channel at the intersection of the ranges. The pilot of the Keats had had no previous opportunity to observe her wrongful position. The negligence of the Boston Maru was in no sense spent but was active at the instant of the collision.

#### *King Coal Case.*

This case is also distinguishable on its facts and in the same manner. But we are at a loss to explain in the light of generally accepted doctrines of admiralty the language of the opinion

written by our distinguished and learned opponent in the case at bar.

We remind the court that we have cited in this brief only a few of hundreds of admiralty cases where vessels improperly anchored or moored were condemned for part or full damages. We do not find in them any suggestion that wrongful anchorage or moorage is not proximate.

*The Waterford*, 6 Fed. 2nd 980.

This case was cited to the trial court by respondent on the proposition that even though the Boston were conceded to be at fault the entire damage must be paid by the Keats. But here the moored vessel was found not at fault. The court said (981):

The Merchant was not at fault. There is no finding of active fault as to her. It is predicated solely upon her mere presence at the point of collision, based upon an alleged controlling regulation which the District Judge referred to.

This is clearly a denial of the existence or controlling character of the regulation referred to.

*The Kathleen Tracy*, 296 Fed. 711.

This opinion of the Southern District of New York was also cited. Here it appeared that the vessel dragged out of the regular anchorage

through stress of weather. No negligence was shown on her part.

*The Daniel McAllister*, 258 Fed. 549, 2nd C. C. A.

This is one of the cases cited in the *King Coal* case and properly since it involves a similar harbor regulation. The New York municipal law forbids boats lying across pier ends "except at their own risk of injury from vessels entering or leaving any adjacent dock or pier." The 2nd Circuit had already held this statute invalid in so far as it attempted to impose a rule of liability on the Courts of Admiralty. However, they recognized departure from the regulation as evidence of negligence sufficient to throw the burden of proof on the violator. Here the tug was clearly at fault. Its negligence broke up various barges from their moorings and set them in collision with one another. We cannot see a suggestion of the last clear chance doctrine in this case.

In the present case the Boston Maru's anchorage was in violation of a statute of the United States. Congress has a clear right to impose a rule of maritime liability on the Federal Courts. *To hold the Boston at fault in her anchorage at the time of the collision, or to say that her anchorage, if wrongful, is immaterial or not proximate, and relieve her from damages on any theory whatever, is to allow her to violate the statute with impunity.*

## CONCLUSION

The principal issues in the case resolve themselves in our minds as follows:

The Boston Maru at the time of the collision was anchored improperly and in violation of the statute. Her negligence was a proximate cause of the collision. It sufficiently explains the collision without more. The burden of proof is upon her to show that there was fault in the navigation of the West Keats. This she has not done by a preponderance of the evidence. Indeed, the preponderance is the other way. Captain Berry's belief that the Boston was in the usual anchorage ground is shown to have been reasonable. He was navigating the channel authorized by the ranges. There was no evidence tending to show that he should have known or suspected that the Boston was out of place before he did. Therefore the cases should be reversed with mandate for the entry of judgment in favor of the West Keats for the stipulated amount with costs.

Respectfully submitted,

GEORGE NEUNER,

*United States Attorney,*

MACCORMAC SNOW,

*Proctors for the United States  
as owner of the West Keats.*

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In the  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

THE JAPANESE STEAMSHIP "BOSTON MARU"

UNITED STATES OF AMERICA,

*Appellant,*

*vs.*

KOKUSAI KISEN KABUSHIKI KAISHA, a  
Corporation, Claimant of the Jap-  
anese Steamer "BOSTON MARU," Her  
Engines, etc.,

*Appellee.*

and

UNITED STATES OF AMERICA, as Owner  
of the American Steamship "WEST  
KEATS," in Personam,

*Appellant,*

*vs.*

KOKUSAI KISEN KABUSHIKI KAISHA, a  
Corporation.

*Appellee.*

**Appellee's Brief**

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GEORGE NEUNER and  
MACCORMAC SNOW,  
*Proctors for Appellant.*

MCCAMANT & THOMPSON and  
RALPH H. KING,  
*Proctors for Appellee.*





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*Appellee.*

---

**Appellee's Brief**

**STATEMENT OF FACTS**

This case arises out of a collision between the "West Keats" and the "Boston Maru" at a point in the Columbia River opposite Columbia City on the early morning of October 26th, 1924. The United States as the owner of the "West Keats" libeled the "Boston Maru" and Kokusai Kisen

Kabushiki Kaisha, the owner of the "Boston Maru," filed a libel in personam against the United States. The two proceedings were consolidated under the above title.

The case was tried before the Honorable Robert S. Bean, who found the "West Keats" wholly at fault and passed a decree accordingly. The damages of the respective parties were fixed by stipulation. In accordance with this stipulation a decree was rendered in favor of the owner of the Japanese vessel in the sum of \$15,788.91. The "Boston Maru" on the 25th of October, 1924, was berthed at the Clark-Wilson Mill at Linnton in the Willamette River. About 5:40 on the afternoon of that day she left down the river for the purpose of taking on additional cargo at St. Helens (Gildez 307). St. Helens is located up on Willamette Slough which branches off the main channel of the Columbia River a short distance above Columbia City. The "Boston Maru" drew twenty-six feet one inch (Gildez 307, 325; Sayeki 511). At that season of the year the Columbia River is low and in order to get into St. Helens it is necessary for vessels to await the flood tide. Under the circumstances of this case it was necessary for the "Boston Maru" to go down the main ship channel in the Columbia River to Columbia City and there anchor until the tide would permit her to steam up the Columbia River and the Willamette Slough to St. Helens (Sullivan 197-198; Grunstad 184; Baldy 157). The "Boston Maru" reached Columbia City about 8:30 P. M. (Sayeki 497; Gildez 307). At that point the width of the

deep water is approximately twelve hundred fifty feet (Sullivan 229; Gildez 309; Berry 353).

The "Boston Maru" was navigated under the direction of Captain George F. Gildez, a Columbia River Pilot, who has been operating on the Columbia River either as a Master or Pilot since 1910, and whose qualifications are proved by the testimony. Captain Gildez anchored the vessel abreast of the front range light on the Columbia City range about the center of the deep water (Gildez 308). After the anchor was dropped and the vessel had steadied at her anchorage, bearings were taken with three of the lights on the Columbia River (Gildez 310-311; Tomita 550; Chiga 532, 552-553). These bearings make it possible to plot the position occupied by the "Boston Maru" with substantial accuracy. It sufficiently appears from the exhibits in evidence that the vessel was anchored slightly nearer the Washington side of the deep water than the Oregon shore. There is shown on the official charts a shoal at the Washington side of the channel created by the dumping of gravel in August, 1921 (Stipulation 193). On the edge of this shoal, as marked on the official chart, the depth of the water is twenty-six feet, and a little further to the Washington shore the depth is only twenty-five feet. At the time of the collision the water in the Columbia River was about one foot above zero at St. Helens (Gildez 326). The evidence is to the effect that a vessel should have at least a foot of water below her keel in order to navigate safely (Gildez 341). Captain Gildez was familiar with the shoal and

with the chart upon which it is shown (Gildez 308-309). He knew that the incoming tide would swing the "Boston Maru" and it was not possible to tell in advance which way the vessel would swing (Gildez 309; Berry 141; Moran 252, 258; Sullivan 218). Captain Gildez endeavored to anchor in the middle of the deep water so that the vessel would stay clear of the shore whichever way she swung (Gildez 310, 333). The "Boston Maru" was four hundred feet long (Record 10, 21).

The evidence is that the incoming tide will cause an anchored vessel to move forward on her chain until her bow is substantially above her anchor, and that she will then swing slowly on a radius not much greater than her length (Sullivan 200; Moran 250-251; Allyn 260; Grunstad 186; Gildez 342).

In this case the "Boston Maru" swung toward the Oregon shore. The weight of the evidence indicates that at the time of the collision she was lying nearly at right angles to the thread of the stream. There was approximately two hundred fifty feet of deep water between her stern and the Oregon shore and fully six hundred feet of deep water between her bow and the shoal above referred to.

Immediately on anchoring the "Boston Maru" her anchor lights were displayed (Gildez 310-311; Tomita 549; Sayeki 464, 504-505). Captain Moran passed down the Columbia River at midnight with the "Georgina Rolph" drawing twenty-

three feet of water (Moran 248). The anchor lights of the "Boston Maru" were burning at this time (Moran 248-249). They were still burning at and after the collision (Swenson 383, 392; Berry 100, 101; Komiyama 562; Sayeki 509; Chiga 540).

The "West Keats" left terminal No. 4 in the Willamette River about 10:50 P. M. on the 25th of October, 1924 (Berry 95). She was in charge of Captain E. H. Berry, one of the Columbia River Pilots. She is a vessel four hundred ten feet in length, drawing at this time twenty-five feet eight inches (Berry 141). Her Master testifies that at full speed she would make ten knots an hour (Swenson 386). There is other testimony offered on behalf of Appellant to the effect that her speed on this particular night was 8.84 nautical miles per hour (Gillette 410). The "West Keats" entered the Columbia River at midnight and operated at full speed from the time she entered the Columbia River until 1:43 on the morning of October 26th, 1924 (Berry 96, 138; Jetts 454-455, 457; Gillette 408-410).

From Warrior Rock, three miles above the place of the collision, there is an unobstructed view of the portion of the river in which the "Boston Maru" was anchored (Sullivan 198-199; Allyn 262). Captain Berry, pilot of the "West Keats," admits that he saw the lights of the "Boston Maru" two miles above the place of the collision (Berry 137). One mile above the place

of the collision he knew that the lights were those of a vessel at anchor (Berry 100, 101, 117, 138). He also knew that there was plenty of room to pass the "Boston Maru" on the Washington side of the channel (Berry 121). All of the evidence is to the effect that the visibility was good on the night in question (Swenson 381; Gillette 408; Sayeki 465; Chiga 536).

Half a mile above the place of collision Captain Berry gave the order "port a bit" and then the order "steady" (Berry 107). The next order was "starboard a bit" (Berry 108). The ship did not respond to her helm when this order was given and the order "hard a starboard" followed. Again the vessel failed to respond to her helm, according to appellant's testimony. The next order, given one minute before the collision, was "stop" (Berry 109). The testimony does not satisfactorily show the interval between these orders or the time at which the order "port a bit" was given (Berry 113).

There is no contention that the speed of the "West Keats" was appreciably checked by the "stop" order given one minute before the collision. The hawse pipe, four or five feet off the bow on the starboard side of the "West Keats," hit the "Boston Maru" starboard counter-aft (Berry 131-134). The blow was a glancing blow and the "West Keats" passed on between the Oregon shore and the stern of the "Boston Maru" (Swenson 395). In two or three minutes Captain Berry had the "West Keats" turned around and



he brought her back on the Washington side of the "Boston Maru" without difficulty (Berry 121-122). Immediately after the collision Captain S. S. Baldy passed up the river in charge of the Norwegian steamer "Siersted." He passed both the "Boston Maru" and the "West Keats" on the Washington side of the channel without difficulty (Baldy 152-153). There seems to have been another vessel as well which passed up the river on the Washington side about this time (Swenson 385; Berry 114-115).

After the collision both vessels proceeded back to Portland to make the necessary repairs.

The apostles do not contain the opinion given orally by Judge Bean on the 22nd of November, 1926, in deciding the case. Believing that the opinion will be of assistance to the court we print it:

"The cases of the Boston Maru and the West Keats grew out of the collision of the West Keats with the Boston Maru while the latter was lying at anchor in the Columbia River.

"The case is important enough to merit a carefully prepared opinion, but the time at my disposal will not enable me to do so, without unnecessarily delaying the decision in this case, and I take it, it is more to the interest of the parties to have the case promptly disposed of, than it is that the court shall delay the decision in order to formulate an elaborate opinion. I therefore

shall state my conclusions in this case without elaboration.

“It appears from the evidence that about half past eight o’clock on the evening of October 25, 1924, the Boston Maru, a vessel about four hundred feet long and drawing twenty-six feet of water, was anchored in the Columbia River about the middle of the ship channel or deep water, opposite Columbia City, to await the tide, in order that she might dock at St. Helens. The deep water at that point is from twelve to thirteen hundred feet wide. The vessel was anchored with her stem upstream, and had out about thirty fathoms of chain. During the night her position was shifted by the tide, so that at the time of the collision she was lying substantially athwart the river. Her anchor lights were in position and burning brightly, and visible to a vessel approaching from upstream for a considerable distance.

“About two o’clock in the morning of the 26th, the West Keats, a vessel four hundred and ten feet long and eight thousand tons gross tonnage, fully loaded, was coming down the river and collided with the Boston Maru, damaging both vessels. Each claims the other was at fault, and each has filed a libel.

“It is a rule of law that where a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel. It is claimed, however, that this rule should not be applied in this case, because the Boston Maru was anchored in violation of a statute which makes it un-

lawful to tie up or anchor a vessel in the navigable channel in such a manner as to prevent or obstruct the passage of other vessels. This statute, however, does not impose an absolute or unreasonable prohibition to the use of the waterways for anchorage. The question in each case is whether the anchored vessel is so placed as to prevent or interfere with navigation. In my opinion the Boston Maru was not so anchored.

“The night was dark and cloudy and her pilot had to be guided entirely by the shore lights. There is no established anchorage ground at the place of this collision, although the evidence shows that vessels have frequently anchored there or near there. It was good seamanship for the pilot to so anchor his vessel that it would not ground in case she should swing. It is said that she should have been anchored near the Washington shore, but the chart offered in evidence shows shoal water on that side, and I take it that it would have been unsafe for him to have anchored any nearer the Washington shore than she did anchor.

“The burden therefore is on the West Keats, in my opinion, to show that the collision was not due to her fault, and this I think she has failed to do.

“Her pilot observed the anchor lights of the Boston Maru when about a mile and a half upstream from her, and at that time knew that a vessel was at anchor athwart the stream. In place of slacking the speed of his vessel or taking any precaution to ascertain the actual location of the anchored vessel he

proceeded downstream at full speed until just a short distance above the Boston Maru, and then attempted to pass to the left or Oregon side. In my judgment it is negligence for a vessel to so approach an anchored vessel on a dark night at full speed and attempt to pass her on the Oregon side without ascertaining the location of the anchored vessel, or at least making some effort to do so. The statute provides that in narrow channels every steam vessel, when safe and practicable, shall keep to that side of the fairway or midchannel which lays on the starboard side of such vessel. Whether this statute applies only to passing vessels, it nevertheless indicates the proper movement of a vessel, in requiring it to keep to its own side of the channel. The West Keats did not do this but attempted to pass on the Oregon side or to her port side, and in my judgment the collision was due entirely to her fault.

“Decrees may be prepared accordingly.”

## POINTS AND AUTHORITIES

### I.

The conclusions of the trial court in an admiralty case embodied in its findings and decree will be set aside on appeal only for manifest error.

*The Bailey Gatzert*, 179 Fed. 44, 48.

*Spencer v. The Dalles Navigation Co.*, 188 Fed. 865, 868.

*The Samson*, 217 Fed. 344, 347.

*Stern v. Fernandez*, 222 Fed. 42, 45-46.

*The Dolbadarn Castle*, 222 Fed. 838, 840.

*The Yucatan*, 226 Fed. 437, 441.

## 13

*The Hardy*, 229 Fed. 985, 986-987.

*The Mazatlan*, 287 Fed. 873, 875.

*Butler v. Pacific Mail Steamship Co.*, 290 Fed. 806, 807.

### II.

When a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel.

*The Oregon*, 158 U. S. 186, 39 L. Ed. 943.

*The Europe*, 190 Fed. 475 (C. C. A. 9).

*The John G. McCullough*, 232 Fed. 637.

*The Gulf of Mexico*, 281 Fed. 77, 79 (C. C. A. 2).

*The Cananova*, 297 Fed. 658, 663.

*The No. C-4*, 300 Fed. 757.

*U. S. v. King Coal Co.*, 5 F. (2d) 780 (C. C. A. 9).

*The Waterford*, 6 F. (2d) 980, 981 (C. C. A. 2).

### III.

It is the duty of a moving vessel to maintain a vigilant outlook.

*The Europe*, 190 Fed. 475, 480.

*The R. G. Townsend*, 205 Fed. 514.

*The John G. McCullough*, 232 Fed. 637, 638-639.

*The Kathleen Tracy*, 296 Fed. 711, 712.

### IV.

The inability to distinguish between the lights of a vessel at anchor and lights on the shore will

not excuse a moving vessel for colliding with a vessel at anchor.

*The John G. McCullough*, 232 Fed. 637, 638-639.

## V.

Where the field of vision is clear, the failure of the officers on the bridge to observe a vessel at anchor whose lights are properly set, in time to avert a collision, is negligence for which the moving vessel will be held responsible.

*The Oregon*, 158 U. S. 186, 39 L. Ed. 943. .  
*The New York*, 175 U. S. 187, 204, 44 L. Ed. 126, 134.

*The Europe*, 190 Fed. 475.

*Pendleton Bros. v. Morgan*, 11 Fed. (2d) 67.

## VI.

A vessel navigating the Columbia River is chargeable with notice that it is customary for vessels to anchor therein.

*The Oregon*, 158 U. S. 186, 39 L. Ed. 943.

## VII.

In cases of doubt or uncertainty a vessel's headway should be checked and she should be navigated with caution until the uncertainty is cleared up.

Hayne on the Rule of the Road at Sea, 18.

*The Owego*, 71 Fed. 537, 544.

*The Maine*, 2 F. (2d) 605, 607.

*The Buenos Aires*, 5 F. (2d) 425, 428.

*The Brinton*, 50 Fed. 581.

*The Libby Maine*, 3 F. (2d) 79, 80.

*The Lizzie M. Walker*, 3 F. (2d) 921, 922.

### VIII.

The test of proper speed is the ability of the vessel to stop her headway in the presence of danger.

Hayne on the Rule of the Road at Sea, 19.

### IX.

It is dangerous to pass an anchored or incumbered vessel at full speed in the night time.

*The Howard Reeder*, 207 Fed. 929, 933.

*The Hamilton*, 212 Fed. 1016.

### X.

It is negligence for a moving vessel to approach too close to another vessel when there is room in the channel for safe passage.

*The Chatham*, 52 Fed. 396, 399.

### XI.

In narrow channels it is the statutory duty of steam vessels to pass to the starboard.

U. S. Code, Title 33, Sec. 210, Sec. 7899  
Comp. Stat., 30 Statutes 101.

*The Kathleen Tracy*, 296 Fed. 711.

*Bisso Towboat Co. v. U. S.*, 6 F. (2d) 132.

## XII.

Custom cannot be relied upon to relieve from the obligation of the above statute.

*Occidental Company v. Smith*, 74 Fed. 261, 267-268.

## XIII.

Where a moving vessel violates a statute enacted to make navigation safe, the burden devolves on such vessel to show that such breach of statutory duty could not have been one of the causes of the collision.

*The Norfolk*, 297 Fed. 251.

## XIV.

A navigator is chargeable with notice of the effect of suction from the bank. If he runs at a speed and on a course which causes his vessel to sheer off because of suction, he is responsible for the resulting damage.

*The Howard Reeder*, 207 Fed. 929, 933.

*The Hamilton*, 212 Fed. 1016.

*The Monroe C. Smith*, 201 Fed. 569, 572.

## XV.

The "Boton Maru" is not held to a standard of care exceeding that habitually exercised by prudent mariners. It was not the duty of the Japanese vessel to put out more than one anchor.

*The City of Richmond*, *The Texan*, 265 Fed. 722, 725.



## XVI.

The anchorage statute, Section 9920, Compiled Statutes, does not forbid anchorage in the channel of the Columbia provided there is room left in the channel for other vessels to pass.

*The Europe*, 190 Fed. 475, 478.

*The Northern Queen*, 117 Fed. 906, 912-913.

*The Job H. Jackson*, 144 Fed. 896, 900.

*The John G. McCullough*, 232 Fed. 637.

*The Grand Manan*, 208 Fed. 583, 587-589.

*Strathleven Steamship Co. v. Baulch*, 244 Fed. 412, 414.

*The Bailey Gatzert*, 179 Fed. 44, 49-50.

*Compania De Navegacion v. Boston Virginia Co.*, 278 Fed. 868, 870.

*The Waterford*, 6 F. (2d) 980, 981.

## XVII.

Anchorage in an improper place does not deprive a vessel of the protection of the laws. She may still recover damages sustained through collision with a moving vessel where the latter vessel with ordinary prudence could have avoided the collision.

*The Yucatan*, 226 Fed. 437, 439.

*American-Hawaiian Co. v. King Coal Co.*,  
11 F. (2d) 41, 43.

*The Kathleen Tracy*, 296 Fed. 711, 712.

*The Waterford*, 6 F. (2d) 980, 981.

*The Daniel McAllister*, 258 Fed. 549, 552.

## XVIII.

A custom or usage must be certain and uniform; otherwise it furnishes no standard for determining whether conduct was prudent or negligent.

*Chicago Milwaukee Co. v. Lindeman*, 143 Fed. 946, 949 (C. C. A. 8).

*Fogarty v. Michigan Central*, 180 Mich. 422, 147 N. W. 507, 510.

*Chicago & Alton Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, 629.

### QUESTIONS AT ISSUE

The contentions of appellant with reference to the charges preferred by appellant against the "Boston Maru" as set forth in its libel and particularly on pages 14 and 23 of the record, are substantially these:

(1) That the "Boston Maru" was improperly anchored in a fairway.

(2) That the vessel was anchored in such a manner as that she would swing broadside to the current and that she was negligently permitted so to swing.

(3) The pilot and officers of the "Boston Maru" failed to give warning of her position to those navigating the "West Keats."

Appellee in its amended libel, abstract pages 34 and 35, makes substantially the following

charges with reference to the navigation of the "West Keats":

(1) The pilot in charge of the "West Keats" confused the anchor lights of the "Boston Maru" with lights on the Oregon shore. He did this although he was chargeable with notice that ships were in the habit of anchoring off Columbia City.

(2) The officers charged with the navigation of the "West Keats" failed to check her speed when the anchor lights of the "Boston Maru" became visible. The "West Keats" was negligent in operating at full speed up to one minute before the collision.

(3) The "West Keats" violated a statutory duty in failing to pass the "Boston Maru" on the Washington or starboard side of the channel.

(4) That the "West Keats" was negligently navigated and permitted to collide at substantially full speed with an anchored vessel whose lights were burning and actually seen by the pilot and officers of the "West Keats."

(5) The "West Keats" was negligent in attempting to pass between the "Boston Maru" and the Oregon shore.

(6) Shortly before the collision the "West Keats" failed to respond to her helm either because of negligence in her navigation or because her steering gear was out of order.

## ARGUMENT

## RESPECT DUE TO FINDINGS OF DISTRICT COURT.

The decree of the trial court passed upon all of the substantial questions which are in dispute between the parties on this appeal. The conclusions of the District Court are set forth in the opinion already quoted, and have been incorporated in the decree found on pages 41 and 42 of the record. We quote from this decree:

“The Court finds that the “Boston Maru” was anchored at a suitable place in the Columbia River at the time of the collision and that it would not have been good seamanship to have anchored the said vessel materially closer to the Washington shore for the reason that the vessel in such event might have swung on to a gravel shoal marked on the chart; the Court also finds that the anchor lights of the “Boston Maru” were in position and burning brightly; the Court also finds that the pilot of the “West Keats” observed the anchor lights of the “Boston Maru” when about a mile and one-half upstream from her and the pilot knew at that time that a vessel was at anchor athwart the stream; that notwithstanding such knowledge the pilot of the “West Keats” neglected to slacken the speed of his vessel or to take any precaution to ascertain the actual location of the anchored vessel, and that the “West Keats” proceeded downstream at full speed until a short distance above the “Boston Maru”; that thereupon the pilot of the “West Keats” endeavored to pass to the left of the “Boston Maru.” That the negli-

gence of the pilot of the "West Keats" in the respects aforesaid is solely responsible for the collision."

This court has repeatedly announced the rule applicable in admiralty with reference to the respect to be given on appeal to the findings of the trial court.

*Spencer v. The Dalles Navigation Co.*, 188 Fed. 865, 868.

In this case the court speaking through Judge Dietrich said:

"The District Judge heard the witnesses testify, and observed their demeanor while upon the stand. His finding upon the conflicting evidence was that the Charles R. Spencer alone was responsible for the collision, and that the Dalles City was wholly without fault. Under the well-settled rules of appellate procedure, the finding ought not, under the circumstances, to be disturbed."

*The Samson*, 217 Fed. 344, 347-348.

In this case the court speaking through Judge Morrow said:

"Out of the great mass of conflicting testimony with respect to the maneuvers of the respective vessels prior to the collision, and the positions of the various tows thereafter, the learned judge of the court below found that the point of collision was well to the Oregon side of the channel, and concluded

that the fault was with the Samson. This finding, under well-settled rules of appellate procedure, should not be disturbed. *Spencer v. Dalles, P. & A. Navigation Co.*, 188 Fed. 865, 868, 110 C. C. A. 499. As said by this court in *The Alijandro*, 56 Fed. 621, 6 C. C. A. 54:

“The rule is well settled that in cases on appeal in admiralty, when the questions of fact are dependent upon conflicting evidence, the decision of the district judge, who had the opportunity of seeing the witnesses and judging their appearance, manner, and credibility, will not be reversed, unless it clearly appears that the decision is against the evidence.”

The above rule has been announced again and again by this court and the principle must be deemed to be firmly settled in this jurisdiction. See for example the following cases:

*The Bailey Gatzert*, 179 Fed. 44, 48 (Judge Morrow).

*Stern v. Fernandez*, 222 Fed. 42, 45-46 (Judge Morrow).

*The Dolbadarn Castle*, 222 Fed. 838, 840 (Judge Gilbert).

*The Yucatan*, 226 Fed. 437, 441 (Judge Rudkin).

*The Hardy*, 229 Fed. 985, 986-987 (Judge Gilbert).

*The Mazatlan*, 287 Fed. 873, 875 (Judge Rudkin).

*Butler v. Pacific Mail Steamship Co.*, 290 Fed. 806, 807 (Judge Rudkin).

## PRESUMPTION AGAINST MOVING VESSEL.

Where a moving vessel collides with a vessel at anchor, the presumption is that the fault is chargeable to the moving vessel.

*The Oregon*, 158 U. S. 186, 39 L. Ed. 943.

*The Europe*, 190 Fed. 475 (C. C. A. 9).

*The John G. McCullough*, 232 Fed. 637.

*The Gulf of Mexico*, 281 Fed. 77, 79 (C. C. A. 2).

*The Cananova*, 297 Fed. 658, 663.

*The No. C-4*, 300 Fed. 757.

*U. S. v. King Coal Co.*, 5 F. (2d) 780, (C. C. A. 9).

*The Waterford*, 6 F. (2d) 980, 981 (C. C. A. 2).

## NO FAULT IN ANCHORAGE.

Appellant contends that appellee is not entitled to the above presumption because the "Boston Maru" was anchored in a fairway. Appellant's contention is that the channel was along the Oregon shore and that the "Boston Maru" was chargeable with negligence in anchoring too close to the Oregon shore.

The contention of appellant in this respect is not borne out by the evidence. The ship channel is the portion of the river where the water is thirty feet deep. This is the testimony of five pilots (Sullivan 220; Moran 250; McNelly 277; Chase 298; Gildez 309).

The position of the "Boston Maru" as it appears on "West Keats'" Exhibit 1 is subject to correction. The evidence clearly shows that a vessel in swinging under the influence of an incoming tide will ride up over her anchor chain and swing on a radius not much greater than her length (Grunstad 186; Sullivan 200; Moran 250-251; Allyn 260; Gildez 342). The length of the "Boston Maru" is four hundred feet, and she must have swung on a radius not appreciably greater than this figure. The deep water at the place where the "Boston Maru" was anchored is approximately twelve hundred fifty feet in width (Berry 353; Gildez 309; Sullivan 229). We think the evidence sustains our contention that even though the "Boston Maru" was lying directly athwart the channel at the time of the collision her stern was approximately two hundred fifty feet from the edge of the channel on the Oregon side. There was approximately six hundred feet between her bow and the gravel shoal. Captain Berry admits that there was plenty of room to pass on the Washington side (Berry 121). Under the statute it was clearly his duty to pass on the Washington side. Captain Berry had no difficulty in getting up on the Washington side of the "Boston Maru" (Berry 121).

About midnight on the night of the collision Captain Moran took the "Georgina Rolph" down the river on the Washington side of the "Boston Maru." This vessel drew twenty-three feet and her pilot had no difficulty in getting her by (Moran 248). Captain Baldy immediately after



the collision brought the "Siersted" up the river on the Washington side of the "Boston Maru" also without difficulty (Baldy 152). Another unidentified vessel came up the river on the Washington side of the "Boston Maru" on the night of the collision (Berry 114-115; Swenson 385).

In this case it was necessary to anchor in the channel (Gildez 331). Between Portland and Astoria there are only two places where a pilot can anchor a deep draft vessel out of the fairway. One of these is at Oak Point or Quinns and the other at Longview or Rainier (Sullivan 246-247; Allyn 263; McNelly 274).

It is impossible for a pilot to tell in advance which way his vessel will swing under the influence of the incoming tide (Berry 141; Moran 252, 258; Sullivan 218; Gildez 309). For this reason it was good practice for Captain Gildez to anchor the "Boston Maru" in the middle of the deep water (Moran 257; Sullivan 198). Captain Allyn and Captain Sullivan, both experienced and competent pilots, state that they would have anchored the "Boston Maru" where Captain Gildez did (Allyn 259; Sullivan 197).

It is also to be said that after dark it is difficult if not impossible for a pilot to fix accurately the place of his anchorage (Sullivan 197; Allyn 259, 267, 270). If the conclusion can be drawn from the testimony that it would have been better for Captain Gildez to have anchored further toward the Washington shore, he cannot

be held to a larger measure of diligence than that which would be exercised by an ordinarily prudent navigator, and in view of the difficulty of fixing the place of anchorage accurately, any small departure from the proper point of anchorage cannot be deemed to be negligence.

Suggestion is made that the "West Keats" could have been anchored further down the river where the channel is wider. Captain Allyn and Captain Sullivan answer this suggestion. There is no light on the shore to guide a pilot with reference to anchorage at a point down the river from the lower Columbia City light, opposite which the "Boston Maru" was anchored. The testimony is without contradiction that it is impracticable to anchor at night without a light on the shore to guide the pilot. (Sullivan 221-222, 233; Allyn 259-260).

The contention is that the "Boston Maru" should have been anchored on the so-called "red range." Testimony is that this is not a range at all (Sullivan 222) and that it was unknown to Captain Gildez (Gildez 323). If the "Boston Maru" had been anchored on this so-called "red range" and the vessel had swung to the Washington side her stern would have grounded on the shoal. This will be apparent to the court from an examination of "West Keats" Exhibit 1. There is twenty-six feet of water on the edge of the shoal and the depth diminishes to twenty-five feet further in. The river at this time at St. Helens was one foot above zero (Gildez 326).

The "Boston Maru" drew twenty-six feet, one inch. Careful navigation requires one foot of water below the keel of the vessel (Gildez 341). The testimony of appellant's own witnesses is that a vessel drawing twenty-five feet or more of water must look out for the shoal marked on the government chart opposite Columbia City (Sandstrom 161; Baldy 156-158).

Captain Sullivan testifies (201) that a gravel shoal will not wash away. This is common sense and in accord with the experience and observation of all men.

It is sufficient for our purposes that the shoal is marked on the government chart. The pilots navigating the Columbia River depend upon these charts (Berry 124; Sullivan 225). It is true that a pilot will occasionally take a sounding, but it is wholly apart from his duties to chart the river. It is the function of the War Department to make soundings and to issue charts for the guidance of navigators using the river. Captain Gildez would have laid himself open to just criticism if he had navigated in disregard of the soundings shown on the government chart.

When the "Boston Maru" was anchored her anchor lights were displayed (Gildez 310-311; Sayeki 464, 504-505; Tomita 549). The lights were still burning when Captain Moran passed down the river at midnight (Moran 248-249). They were also burning at and after the collision (Berry 100-101; Swenson 383, 392; Komiyama

562; Sayeki 509; Chiga 540). There was an unobstructed view from Warrior Rock on (Allyn 262; Sullivan 198-199). Warrior Rock is three miles above the place of collision. The visibility was good (Swenson 381; Gillette 408; Sayeki 465; Chiga 536). As a matter of fact Captain Berry on the bridge of the "West Keats" saw the lights of the "Boston Maru" when he was two miles away (Berry 137). He recognized that these were the lights of a vessel at anchor when he was one mile away (Berry 138, 100, 101, 117). Mr. Gillette, second officer on the "West Keats," testifies that there would have been no difficulty in passing the "Boston Maru" on the Washington side of the channel if the maneuver had been made at that time (Gillette 429).

#### LAW APPLICABLE.

Appellant claims that the "Boston Maru" violated Section 9920 of the Compiled Statutes. This section is as follows:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

This statute has been frequently construed by the courts, including this court, and it is well established that a vessel at anchor is not violating the statute provided she leaves sufficient room in the channel for other vessels to pass. A decision of this court is one of the leading cases in the construction of this statute.

*The Europe*, 190 Fed. 475, 478.

Here the court said:

“The argument based upon the first and third grounds, as stated above, is completely refuted by the decision of the Supreme Court in the case of *The Oregon*, 158 U. S. 186. On the authority of that case, we hold the law to be settled that an ocean-going vessel may lawfully lie at anchor in the night time in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels, in violation of the act of Congress prohibiting such obstruction. 30 U. S. Stat. 1152; U. S. Compiled Stat. 1901, 3543; 6 F. S. A. 817; Pierce’s Fed. Code, No. 11105. We also hold that the words ‘prevent or obstruct,’ in this statute are positive words, indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition.”

*The John J. McCullough*, 232 Fed. 637.

In this case the District Court for Virginia said:

“That the *Begonia* cannot be held to be at fault in anchoring where she did under the law (30 Stat. 1152, No. 15) particularly as settled in this circuit. *The Job H. Jackson* (D. C.), 144 Fed. 900, 901; *The Hilton* (D. C.), 213 Fed. 997, 1000; *The Caldy*, 153 Fed. 837, 840, 83 C. C. A. 19; *The Margaret J. Sanford* (D. C.), 203 Fed. 331; *Id.* 213 Fed. 975, 130 C. C. A. 381. The last citation is the decision of the Circuit Court of Appeals of this circuit,

and to that case, and the cases therein cited, reference is made, as giving the law applicable to the anchorage of vessels, which is briefly to the effect that it was not the purpose of the act of Congress in question to absolutely forbid anchoring in navigable streams, other than at such places as would necessarily prevent the passage of vessels, or obstruct them in passing, to such an extent as to make the effort to do so a dangerous maneuver, and that if a vessel anchored at a point in the channel where, notwithstanding such anchorage, other vessels navigating with the care the situation required, could safely pass, then she neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though in some degree she obstructed the channel."

*The Grand Manan*, 208 Fed. 583.

This was a decision rendered by the District Court for Maine. On page 587 of the report the court quotes section 9920 of the Compiled Statutes. It is thereupon said:

"This act seems to be declaratory of the general maritime law upon the subject."

On pages 587 and 588 the court further says:

"In *The Europe*, 190 Fed. 474, 479, the Circuit Court of Appeals for the Ninth Circuit held that a vessel might lawfully lie at anchor in the night time in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels in violation of the act of Congress prohibiting such obstruction. The court said: 'We also hold that the words "prevent or obstruct" in

this statute are positive words, indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition.’”

The court cites and discusses a number of authorities. On page 589 it is said:

“The test generally applied by the courts is whether the vessel is so anchored as to leave a sufficient passageway for others.”

*Strathleven Steamship Co. v. Baulch*, 244 Fed. 412, 414.

Here the Circuit Court of Appeals for the Fourth Circuit says:

“If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels navigated with care can safely pass, she does not violate the statute or render herself liable under the general rules of navigation, although she obstructs the channel to a certain extent. On the other hand, if the anchored vessel occupies so much of the channel as to practically impede its navigation or make the effort to pass her a dangerous maneuver, she has placed herself in a position which the statute forbids, and must take the consequences of her unlawful act.”

*The Northern Queen*, 117 Fed. 996, 912-913.

Here the court said:

“The question, therefore, presented is whether the *Pathfinder* and *Sagamore* shall

be held at fault for anchoring in the fairway in a dense fog in Whitefish Bay at the head of St. Mary's River. \* \* \* The proofs do not establish a custom requiring anchoring out of a sailing course. No regulation prohibited it. There was no special insecurity for lying at anchor at this place, fog signals being sounded, when the fairway was one-half mile wide, with an abundance of navigable water on each side; the navigable channel being 4 miles in width at the point of collision. It has often been held that if there is no rule or custom requiring a vessel to bring up out of the fairway, she might anchor there, although directly in the track of ships. Marsden Maritime Collisions 234; Spencer, Maritime Collisions Sec. 111; The Ogemaw, 32 Fed. 924. \* \* \* I am clearly of the opinion that there is no fault attributable to the Pathfinder for anchoring in the sailing course at this point."

*The Job H. Jackson*, 144 Fed. 896, 900.

Here the District Court for the Eastern District of Virginia said:

"It may be said in passing that the trend of interpretation of the act has been to give it a liberal meaning, and that its purpose was not to prevent vessels from coming to anchor in navigable channels, but to forbid them from doing so in such manner as to obstruct said channels, or render their navigation difficult or dangerous."

To the same effect see

*The Bailey Gazert*, 179 Fed. 44, 49, 50.



## CUSTOM OR USAGE.

It is contended that it was a custom to anchor vessels opposite Columbia City and at a point nearer the Washington shore than that occupied by the "Boston Maru," and based upon this custom it is contended that the pilot of the "Boston Maru" was guilty of negligence in anchoring at the point chosen by him.

We have already shown that a vessel drawing twenty-six feet one inch of water could not safely anchor at the point contended for by appellant. An examination of "West Keats'" Exhibit 1 will show clearly that if the "Boston Maru" had been anchored at the point contended for and had drifted toward the Washington shore she would have drifted onto the shoal and gone aground.

Apart from this contention the evidence wholly fails to establish any such usage or custom as can serve as a guide to the court in passing on the conduct of Captain Gildez in anchoring where he did. Captain Gildez explains clearly, and we think satisfactorily, the reasons why he anchored nearly midway in the deep water. His conduct in this respect accords with the practice of other pilots, as outlined by their testimony (Moran 257; Allyn 259; Sullivan 197-198, 221). It is true that several pilots called on behalf of the "West Keats" testified that their practice accords with the alleged custom, but it is familiar law that a custom to be binding in matters of this kind must be certain and uniform.

*Chicago, Milwaukee Co. v. Lindeman*, 143 Fed. 946, 949.

This is a decision of the Circuit Court of Appeals for the Eighth Circuit. The litigation was a personal injury case and the custom relied upon was one with reference to the movement of a locomotive. Judge Sanborn said:

“A custom has the force of law, and furnishes a standard for the measurement of many of the rights and acts of men. It must be certain or the measurements by this standard will be unequal and unjust. It must be uniform; for, if it vary, it furnishes no rule by which to mete. It must be known, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform, and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care.”

*Fogarty v. Michigan Central Co.*, 180 Mich. 422, 147 N. W. 507, 510.

This also was a personal injury case, plaintiff relying upon an alleged custom to give warning of the approach of a backing train. The court said:

“The most that can be said of plaintiff’s evidence, taken as a whole, is that sometimes the defendant sent a man in advance of a train being backed in and sometimes stationed a brakeman upon the front end of the forward car. This situation was not such a one as would warrant plaintiff in the belief that he would be personally notified of the approach of an oncoming train by a man sent in advance. \* \* \*

“A custom must be certain, uniform, and invariable. It must also be notorious; that is, known to all persons of intelligence having to do with the subject to which it relates.”

*Chicago & Alton Co. v. Harrington*, 192 Ill. 9, 61 N. E. 622, 629.

Here the court said:

“A usage or custom must be certain and uniform and general. A custom is general when the method of dealing is the universal method of those engaged in the business where the usage exists.”

#### PROXIMATE CAUSE.

Even though it were admitted that the “Boston Maru” was improperly anchored, this record would still call for an affirmance of the decree appealed from. The evidence clearly shows that the proximate cause of the collision was the negligent navigation of the “West Keats.” A vessel anchoring at an improper place does not thereby forfeit the protection of the laws. It is still the duty of navigators to avoid colliding with her. A

vessel which negligently collides with her is solely responsible for the accruing damage. This court is firmly committed to this principle.

*The Yucatan*, 226 Fed. 437, 439.

In this case the court affirmed the decision of Judge Bean. The case involved collision with the *Boston* which lay at anchor in the middle of the Willamette River near the Broadway Bridge. The Court of Appeals speaking through Judge Rudkin said:

“Assuming that the state of Oregon was guilty of negligence in mooring the *Boston* in the fairway, and in permitting her guns to extend beyond the rail, in violation of the ordinances of the city of Portland, such negligence would not bar a recovery if the collision could have been averted or avoided by the exercise of reasonable diligence on the part of the officers of the *Yucatan*. A person does not invite the destruction of his property simply by leaving it exposed in a public place, even though his act in so doing may create a public nuisance. \* \* \* The negligence of the state, if negligent at all, would not bar a recovery, unless such negligence caused or contributed to the injury.”

The above decision of Judge Rudkin has been more recently affirmed and followed:

*American-Hawaiian S. S. Co. v. King Coal Co.*, 11 F. (2d) 41, 43.

It is suggested in appellant's brief that the above decisions are anomalous and out of har-

mony with the law declared generally by the admiralty courts. This contention certainly is in error. The rule announced by the above authorities is announced generally.

*The Kathleen Tracy*, 296 Fed. 711, 712.

Here the District Court for the Southern District of New York said:

“It is true that no other vessel dragged off the anchorage ground, and that with her other anchor down, or perhaps even with a longer scope of chain on the port anchor, the steamer might not have dragged at all. But she does not become an outlaw because she dragged off the anchorage ground; nor does she become an obstruction to navigation ipso facto because she anchored again outside of anchorage grounds.”

*The Waterford*, 6 F. (2d) 980, 981.

This is a decision by the Circuit Court of Appeals for the Second Circuit. The third paragraph of the syllabus is as follows:

“Tug by mooring at point in canal prohibited by rule, did not contribute to collision, with its tow, of tow of moving tug, when the master of the latter, having before him in plain view all the possibilities of the situation as he came out of the lock, gave no signals, but proceeded, accepting the situation, and with reasonable navigation would have avoided collision.”

*Compania De Navegacion Interior S. A. v. Boston-Virginia Transp. Co. et al*, 278 Fed. 868, 870

A steamship was anchored by a pilot near the left edge of the channel, and had swung toward the left bank where its stem was held by soft mud. In that position her stern was between 60 and 80 feet from the left bank of the river. The water along the left bank was shallow. In front of the steamship's bow and toward the right bank the channel was sufficiently wide and deep for safe navigation. The river at this point was between 1000 to 1200 feet wide, and the fairway from 700 to 800 feet wide. The place at which the steamship was anchored was a loading place for vessels.

In holding a tug coming into collision with the steamship to be wholly at fault, the court stated on page 870:

“It is contended by the owner of the tug that the Stoddard was at fault in anchoring and in remaining in such a position as to obstruct navigation, and that therefore her owner cannot recover, or in the alternative, that the damages should be divided. But the evidence fails to show negligence upon the part of the Stoddard which in any degree contributed to the collision. There was ample space in the channel for other vessels to pass. On the other hand, the negligence of the tug was clearly established, and that negligence was the proximate cause of the collision. It was negligent to undertake to pass between the steamship and the bank of the river. When it became apparent to the Tomboyache

that the Stoddard was aground, either one of two courses could have been adopted to prevent the collision: The tug could have been brought to a standstill, or it could have remained in the channel. Under these circumstances, the burden was upon the owner of the tug to make the fault of the anchored vessel clearly appear. *The Clarita and The Clara*, 23 Wall. 1, 23 L. Ed. 146; *The Virginia Ehrman*, 97 U. S. 309, 24 L. Ed. 890; *The City of New York*, 147 U. S. 72, 13 Sup. Ct. 211, 37 L. Ed. 84; *Eagle Oil Transport Co. v. Bowers Southern Dredging Co.*, 255 Fed. 52, 166 C. C. A. 380; *The Europe*, 190 Fed. 475, 111 C. C. A. 307.”

*The Waterford*, 6 F. (2d) 980, 981.

“After colliding with a vessel at a standstill, the one navigating must exonerate herself from blame by showing that it was not within her power to prevent the collision by adopting practical precautions under the rule announced in *The Gulf of Mexico* (C. C. A.), 281 F. 77, and the *E. S. Atwood* (C. C. A.), 289 F. 737.

“The Merchant was not at fault. There is no finding of active fault as to her. It is predicated solely upon her mere presence at the point of collision, based upon an alleged controlling regulation which the District Judge referred to. The Merchant and her tow were in fact moored at the point where the *Waterford* emerged from the lock, and had been so moored for 20 or 30 minutes. The situation was the same then as it was at the moment of impact. There was no substantial change in her position. The master

of the Waterford had before him in plain view all the possibilities of the situation as he came out of the lock, and gave no signals whatever but proceeded, accepting the situation. Under such circumstances, nothing in the presence of the Merchant in this water contributed to the happening of the collision, and the navigating vessel could have, with reasonable navigation, avoided the collision. *The Granite State*, 70 U. S. (3 Wall.) 310, 18 L. Ed. 179; *The Clarita*, 23 Wall, 1, 23 L. Ed. 146."

To the same effect see

*The Daniel McAllister*, 258 Fed. 549, 552.

The allegations of our amended libel (Apostles 31-33) lay a proper foundation for the contention which we are now making.

It should be borne in mind that it was necessary for the "Boston Maru" to anchor and await the incoming tide in order to reach St. Helens, where she was to load the remainder of her cargo. The depth of the water at low tide was not sufficient to enable the "Boston Maru" to get in to St. Helens.

#### ONE ANCHOR SUFFICIENT.

It is suggested in appellant's brief that the "Boston Maru" should have put out a stern anchor in addition to her bow anchor. This contention finds no support in the testimony. A number of expert witnesses were called by appellant and the failure of appellant's proctor to ask



them any questions along this line is significant. Appellee did prove by the uncontradicted testimony of Captain Sullivan that it is not customary for vessels navigating the Columbia River to put out more than one anchor (Sullivan 200). This witness also testified that the vessels navigating the Columbia River are as a rule not equipped with gear for putting out a stern anchor (200-201).

The law arising on this state of facts is clearly announced in

*The City of Richmond. The Texan*, 265 Fed. 722, 725.

“Courts have occasionally suggested that under certain circumstances it may be the duty of a ship to hold herself steady by the use of both bow and stern anchors. Such observations have usually been made when the ship was so anchored that its swinging would nearly or altogether close a channel. The *Texan* argues that it is so rare for merchant vessels to make themselves fast in the manner suggested that an unexpected resort to it in thick weather would increase rather than diminish danger to other craft. When a ship’s lights are made out, the natural presumption, in view of the almost universal practice, is that the ship is heading to wind and tide. If, in a particular instance, this assumption turns out to be wrong, a collision may well result.

“It is unnecessary to pass upon this contention, for, if the *Texan* be held blameworthy for not mooring, she will be held to

a standard of care exceeding that habitually exercised by prudent mariners, and be punished for not doing what no merchant ship appears ever to have done in the Baltimore harbor. That would seem to be a severe measure, when the direct and proximate cause of the collision was the clear breach of duty on the part of the City of Richmond."

#### NO WARNING TO "WEST KEATS."

It is finally suggested by appellant that the "Boston Maru" should be charged with the responsibility for the collision because no warning was given the "West Keats" by the "Boston Maru." Complaint is made of the fact that Captain Gildez went to sleep in the cabin after he had anchored the "Boston Maru." The entire contention of appellant on this branch of the case is answered by Captain Gildez in testimony found on pages 337-339 of the Apostles:

"Q. If you had been on deck at the time the 'West Keats' was approaching, you could have given some sort of signal, couldn't you?

A. No, sir.

Q. Are you familiar with the rule respecting anchored vessels, that they shall give some sort of special signals on occasions when necessary?

A. There is a rule to that effect when it is foggy and thick.

Q. You don't consider that rule is applicable to clear weather?

A. No, sir.

Q. You don't know of any rule applying to clear weather requiring anchored vessels to give signals by noise or by lights if necessary?

A. If necessary, yes, but clear night, anchor lights burning, there is no reason in the world why it should be necessary. The man on the other ship can undoubtedly see your lights; he can see you are an anchored vessel then.

Q. So there was no possible reason for application of that rule in clear weather?

A. Not that I know of, sir.

Q. You consider the rule as applicable only to foggy weather?

A. Just foggy or bad weather.

Q. Now, if you had been on deck at the time the 'West Keats' was approaching you could have started the engines of the 'Boston Maru' and kicked her out of the channel very quickly, couldn't you?

A. No, sir.

Q. Couldn't you have swung her around so that she would have headed upstream again?

A. No, sir. I heard him testify that one minute they knew there was going to be a collision, the people on board the 'West Keats.' One minute wouldn't have given the engineers time to get even ready, so I wouldn't have known there was going to be any collision any quicker than they did.

Q. Well, if you had been on the stern of the 'Boston Maru,' looking over at the shore light, you could have made some sort of an estimate as to the distance she was from the Oregon shore, couldn't you?

A. If somebody had told me the 'West Keats' was going to run into us I would probably have gone to the stern and put out a duffle-bag over the side, but nobody told me that. I didn't even know the 'West Keats' was coming down the river, or any other ship."

The testimony shows that Captain Berry saw the lights of the "Boston Maru" two miles above the place of collision (Berry 137). One mile above the place of collision he made out these lights as those of a vessel at anchor (Berry 138, 100, 101, 117). No warning that the "Boston Maru" could have given would have advised the "West Keats" of any facts which were not already known to her pilot. Furthermore, Captain Gildez, if he had been on deck, would have had a right to expect that the "West Keats" would obey the law and pass the "Boston Maru" on the Washington side of the channel. The collision was not expected on the "West Keats" until one minute before it occurred (Berry 114).

Proctor for appellant cites no statute or regulation requiring an anchored vessel in the absence of fog to give warning to moving vessels in the vicinity. We contend that there is no such statute or regulation. In the absence of fog the riding lights of the vessel at anchor are the only warning which the statute requires.

**“WEST KEATS” RESPONSIBLE.**

The facts making out the responsibility of the “West Keats” are for the most part established by testimony which is clear and uncontroverted. It appears that the “West Keats” entered the Columbia River at midnight and that it was operated at full speed from that time until 1:43 A. M., which was one minute before the collision (Berry 96, 138; Jetts 454-455, 457; Gillette 408-410). The visibility was good (Swenson 380-381; Sayeki 465; Chiga 536; Gillette 408). There was an unobstructed view of the portion of the river in which the “Boston Maru” was anchored from Warrior Rock on (Allyn 262; Sullivan 198-199). Warrior Rock is three miles above the place of collision. Captain Berry, in charge of the navigation of the “West Keats,” saw the lights of the “Boston Maru” two miles above the place of collision (Berry 137). He was uncertain what these lights were but he did not check his speed, continuing full speed ahead until one minute before the collision.

Captain Berry admits that he recognized the lights of the “Boston Maru” as those of a vessel at anchor when he was one mile above the place of collision (Berry 138, 100, 101, 117). He knew at that time that the stern of the vessel was turned toward the Oregon shore (Berry 117). It appears from his testimony that he knew these things when his vessel was opposite light 28-2. It will be found by an examination of the government chart, “West Keats’ ” Exhibit 1, that this point is

fifty-three hundred feet up the river in a straight line from the place of collision. By the course which the "West Keats" took it would be a longer distance. Mr. Gillette, the second officer on board the "West Keats," testifies that after the pilot recognized the lights ahead as those of an anchored vessel it would have been possible to pass the anchored vessel on the Washington side (Gillette 429). This was the clear duty of the navigator under the provisions of Section 7899 Compiled Statutes, U. S. Code, Title 33, Section 210. Captain Moran, an hour or so before, had taken the "Georgina Rolph" down the river, passing the "Boston Maru" on the Washington side (Moran 248). Three pilots of intelligence and experience testify that the "West Keats" could have been deflected to the Washington side of the channel one thousand to twelve hundred feet above the place of collision (Sullivan 199, 236; McNelly 276, 296; Gildez 313-314). There was plenty of room on the Washington side of the "Boston Maru" (Berry 121). The facts in the case are a demonstration that there was also enough room to pass on the Oregon side if the "West Keats" had been properly navigated. The "West Keats" did get by on the Oregon side without grounding (Berry 139; Swenson 390).

There is testimony on behalf of appellant that it would take half an hour or such a matter to stop the "West Keats." The fact is that after the collision the pilot got her headway off in about three minutes (Berry 122; Swenson 392). This

although the collision was a glancing blow only (Swenson 395). Thereafter the "West Keats" steamed up without difficulty on the Washington side of the "Boston Maru" (Berry 121; Swenson 385). Captain Baldy, in command of the "Siersted" (153-154) and another unidentified vessel also passed up the river on the Washington side of the "Boston Maru" (Berry 114-115; Swenson 385). The facts in the case are a demonstration that there was ample room and ample opportunity for the "West Keats" to pass the "Boston Maru" on the Washington side of the channel.

It further appears that shortly before the collision the "West Keats" failed to respond to her helm. The order was given by the pilot "starboard a bit" (Berry 108). The vessel failing to answer, the pilot gave the order "hard a starboard" (Berry 109). Again the "West Keats" failed to respond to her helm.

#### STATUTES.

The law applicable to the above state of facts we claim is clear and even statutory.

Section 7899, Compiled Statutes, U. S. Code, Title 33, Section 210, 30 Statutes at Large 101, is as follows:

"In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel."

Section 7903, Compiled Statutes, 30 Statutes at Large 102, is as follows:

“Nothing in these rules shall exonerate any vessel, or the owner, or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.”

#### DUTY TO OBSERVE.

In the construction of these statutes the courts lay upon every moving vessel the strict duty to maintain a vigilant outlook. Where there is no obstruction to the vision and no difficulty in navigating caused by wind, tide or current, the failure of the moving vessel to observe the anchored vessel and to avoid her is negligence for which the moving vessel is held to strict account. *The Europe*, 190 Fed. 475, 480 (C. C. A. 9).

Here the court said:

“In his testimony the pilot of libelant’s steamboat stoutly maintained that he did not see lights on the *Europe* until he climbed upon her forecastle after the collision, but, if her lights were visible so as to have been seen by him at a distance of one mile, they were sufficient to indicate the presence of the *Europe*, and the failure of the steamboat to avoid her was inexcusable. The attempt to account for the failure of both the pilot and the steamer’s lookout to see both or either of the lights on the *Europe* upon the theory



that the forward light was obscured by the forestay to which it was suspended and the wrapping upon it, and by the jib boom with the furled sails thereon, is a complete failure.”

“The fact appears by the testimony of both of them that the pilot and the lookout were immediately prior to discovering the Europe intent in looking for and trying to drift timber floating in the water. From this and the facts that the collision occurred and that they deny having seen the lights, which certainly were upon the Europe, there arises a necessary inference that they were negligent in not looking forward far enough and sweeping a space wide enough and high enough to see a light hung 17 feet and 6 inches above the forecastle deck of the Europe.”

To the same effect

*The R. G. Townsend*, 205 Fed. 514.

*The John G. McCullough*, 232 Fed. 637, 638-639.

*The Kathleen Tracy*, 296 Fed. 711, 712.

The inability of the navigator to distinguish between the lights of the vessel at anchor and lights on shore will not excuse the moving vessel for colliding with the vessel at anchor.

*The John G. McCullough*, 232 Fed. 637, 638-639.

Where the field of vision is clear the failure of the officers on the bridge to observe a vessel at

anchor, whose lights are properly set, in time to avert a collision, is negligence for which the moving vessel will be held responsible.

*The Oregon*, 158 U. S. 186, 39 L. Ed. 943.

*The New York*, 175 U. S. 187, 204, 44 L. Ed. 126, 134.

*The Europe*, 190 Fed. 475 (C. C. A. 9).

In *Pendleton Bros. v. Morgan*, 11 F. (2d) 67, the Circuit Court of Appeals for the Fourth Circuit said:

“The observation of the light three-quarters of a mile away afforded ample time to avoid the collision, and those navigating the *Pendleton* were charged with a duty to see a light admittedly burning, which a vigilant lookout would have observed. *The failure to discover lights until too late to avoid a collision is tantamount to a failure to have a look out at all.*”

#### DUTY WITH REFERENCE TO SPEED.

As above pointed out it appears without contradiction that the “*West Keats*” was operated at full speed from the time she entered the Columbia River until one minute before the collision, a distance in excess of fifteen miles and a period of one hour and forty-three minutes. This full speed headway, amounting to nearly if not quite ten knots an hour, was maintained after the pilot saw the lights which subsequently proved to be those of the “*Boston Maru*,” and even after he knew that the lights were those of a ship at

anchor. Captain McNelly (Apostles 289) testifies that in such a case as that which confronted the "West Keats" the pilot should get the way off his ship and stop her. We claim the law to be well settled that a navigator must check his speed when uncertain as to the conditions ahead of him.

Hayne on the Rule of the Road at Sea, page 18, says:

"When there is the slightest doubt or uncertainty from any cause, or where risk of collision is apparent—the vessel's headway should be stopped, and she should then be navigated with great caution until the uncertainty is cleared up."

To the same effect

*The Owego*, 71 Fed. 537, 544.

When confronted with danger or uncertainty it is the duty of a moving vessel to reverse her engines and stop.

*The Maine*, 2 F. (2d) 605, 607.

This is a decision of the District Court for the District of Oregon. The court says:

"Among the specifications of negligence, it is asserted by the libelant that the Maine did not stop and reverse her engine in time to avoid striking the raft, and was improperly and carelessly navigated. These specifications, in my view, have been sustained by the evidence. The navigation officers were sea-

sonably apprised of the position of the Gamecock, and at once either signified or consented with her to a port to port passing. Only shortly subsequently the Maine became apprised that the Gamecock was incumbered with a tow, and saw the lights on the tow. The night was dark, and a heavy wind was blowing—almost, if not, a veritable gale. It was customary for boats to carry a tow of like construction and dimensions as the one attached to the Gamecock, and on the same course adopted, and the pilot of the Maine was not unaware of these conditions, and should have been forewarned of the probable situation at the time he became aware that the Gamecock had a tow of logs in charge. This was in ample time so to have managed her navigation as to readily avoid the threatened danger. She should have been brought to a full stop at once, or very soon after she was put at half-speed ahead. Such a maneuver would have afforded time to clear up the situation, and the collision could have been avoided.”

*The Buenos Aires*, 5 F. (2d) 425, 428.

In this case the Court of Appeals for the Second Circuit said:

“It was the duty of the Buenos Aires when she discovered the Windrush ahead, without knowing definitely the course the latter was pursuing, to stop and reverse in the face of the manifest danger of the situation. In *The Cushing* (C. C. A.), 292 F. 560, 563, 565, this court held that the failure of the steamer to stop and reverse her engines in the face of danger was sufficient to fasten liability upon

her. We there said: 'Failure to reverse until just before the collision is indicated by the log. Steam vessels must stop their engines in the presence of danger, or even anticipated danger, and the failure to do so has been the cause of condemnation of many vessels, where collisions have occurred. The New York, 175 U. S. 187, 20 S. Ct. 67, 44 L. Ed. 126.' "

These principles are also recognized by

*The Brinton*, 50 Fed. 581.

*The Libby Maine*, 3 F. (2d) 79, 80 (D. C. Wash.)

*The Lizzie M. Walker*, 3 F. (2d) 921, 922 (C. C. A. 4).

#### TEST OF SPEED.

In Hayne on the Rule of the Road at Sea, page 19, it is said:

"The test of proper speed, in all cases, is the ability of the vessel to stop her headway in the presence of danger."

It is dangerous to pass an anchored or incumbered vessel at full speed in the night time.

*The Howard Reeder*, 207 Fed. 929, 933 (C. C. A. 4).

*The Hamilton*, 212 Fed. 1016.

*The Alexander Folsom*, 52 Fed. 403, 410..

Here the Circuit Court of Appeals for the Sixth Circuit said:

“It is said by the learned district judge ‘that the tendency to sheer from suction in that channel by vessels passing under the conditions of this case was so well known by skillful seamen that the master of the *Mitchell* should have considered it possible, if not probable, on the part of the *Devereaux*, and have so far guarded against it as to have had his own vessel in perfect control, and his wheel on the starboard, so as to have headed his vessel to port, and have been able to put her in that course, promptly, when the emergency made it necessary.’

“If this proposition is correct, should not the master of the *Devereaux* have considered a sheer on her part possible, if not probable, and have so far guarded against it as to have had his own vessel in perfect control, and her wheel on the starboard, so as to have headed his vessel to port? Instead of doing this, he was proceeding down the channel with his wheel steadied about midships, and did not order it to starboard till after discovering the sheer. It would hardly be a fair or consistent rule to put upon the *Mitchell* the duty of anticipating and guarding against the *Devereaux* sheering, and at the same time exonerate the *Devereaux* from the obligation of taking precautions to prevent or counteract the alleged well-known tendency to sheer.”

It is negligence for a moving vessel to approach too close to another vessel when there is room in the channel for safe passage.

*The Chatham*, 52 Fed. 396, 399 (C. C. A. 4).

## DUTY TO KEEP TO THE RIGHT.

Section 7899 of the Compiled Statutes, U. S. Code, Title 33, Section 210, which we have quoted above, plainly required the "West Keats" to keep to the right and to pass the "Boston Maru" between the latter vessel and the Washington shore. It was the duty of the "West Keats" to obey this statute.

*The Kathleen Tracy*, 296 Fed. 711.

*Bisso Towboat Co. v. U. S.*, 6 F. (2d) 132  
(C. C. A. 5).

It will be contended on the part of the "West Keats" that it was customary for vessels to proceed close to the Oregon shore at the point in question, but a custom cannot be relied on to repeal or evade a statute which is applicable. The Circuit Court of Appeals for the Ninth Circuit speaking through Judge Hanford has so held with reference to this particular statute.

*Occidental Company v. Smith*, 74 Fed. 261, 267-268.

"This case affords an opportunity which should not be lost for emphasizing another important rule for preventing collisions, which must be observed by navigators. This is found in article 21 of the international rules, above referred to, and article 25 of the act of August 19, 1890 (1 Supp. Rev. St. (2d Ed.) 781-788), which reads as follows: 'In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies

on the starboard side of such vessel.' The statutes of California contain a similar provision, to which reference was made in the opinion of the district judge. This rule was violated by the Oceanic in entering the Golden Gate on the occasion of the disaster involved in these suits, and the only excuse offered for taking the north side is that it is customary for large vessels in entering to take the north side. We cannot find in the testimony or argument of counsel any attempt to give a reason for the alleged custom, and, if it be true that there is such a custom, it is bad in principle, and contrary to law, and the courts will not recognize it as affording any ground for exempting a vessel from liabilities incurred by disregarding the law."

#### STATUTE APPLICABLE.

It is contended that Section 7899 of the Compiled Statutes is a passing rule and is inapplicable to a collision between a moving and an anchored vessel. In support of this contention appellant cites

*The John H. Starin*, 122 Fed. 236, 239.

There is a passing remark by the court in the above case which gives some color to appellant's contention, but this remark was not the ground work of the decision. The case turned on the failure of the anchored vessel to put out her riding lights.

Appellant also cites on this subject

*The Belfast*, 226 Fed. 362, 366.



What is said on the subject does not carry to our minds the conclusion which appellant's counsel puts upon it. The case was one of flagrant violation of the law and of the port regulations. The language used by the court is designed to emphasize the court's view of the fault of the anchored vessel in violating the law and the regulations.

We submit that the above statute is too clear to require construction. It is as follows:

“In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fair-way or mid-channel which lies on the starboard side of such vessel.”

#### EFFECT OF VIOLATION OF STATUTE.

The testimony clearly showing that the “West Keats” violated the above statute, there is a strong presumption that the “West Keats” was solely responsible for the damage caused thereby. The rule is stated thus by the District Court for Maryland in

*The Norfolk*, 297 Fed. 251:

“The burden of proof is upon the Norfolk to show that her failure to abide by the rule had no connection with the accident which followed. It has been repeatedly held that the breach of a statutory rule is such a fault as to throw upon the offending vessel the burden of proving, not merely that the breach might not have been one of the causes of the collision, or that it probably was not, but that it could not have been.”

## SUCTION FROM BANK NO DEFENSE.

It is the contention of appellant that in her endeavor to pass between the "Boston Maru" and the Oregon shore, the "West Keats" approached too close to the Oregon shore and came within the reach of suction from the bank. It is contended that this caused the bow of the "West Keats" to sheer over to starboard and to collide with the "Boston Maru." If the facts sustained this contention it would not excuse the "West Keats."

*The Howard Reeder*, 207 Fed. 929, 933.

Here the Circuit Court of Appeals for the Fourth Circuit said:

"The Columbia was presumed to know the depth of the channel, of the existence of the deep-water channel and its width, of the difference in the draft of the ship, in running at high or low speed, and of the danger of sheering in passing in too close proximity to the banks. Whether this collision occurred because of the Columbia's sheer, from running too close to the channel's banks, or because, while running at such speed, she put her wheel hardaport and suddenly reversed, and from the kick incident thereto, is utterly immaterial since in either event the sheer was caused by the excessive rate of speed of the Columbia at a time when prudence required that she should have slowed down. Without such sheer there manifestly could have been no collision in 300 feet of clear channel way. The Columbia's navigator should not have waited to slow down until

she was abreast of the tug, as he admits he did, and until his vessel, as he says, began to 'run,' as he calls it, or sheer from the bank. She was at the time only some 450 feet away from the barge, and manifestly the effort to check her speed, then for the first time made, was too late to accomplish any real good. Good seamanship required that she should have anticipated danger in such a maneuver, and for the consequences arising therefrom she can neither escape responsibility nor justly call upon others to share her losses."

*The Hamilton*, 212 Fed. 1016.

Here the District Court for the District of Virginia said:

"The ship's position is that in the effort to pass the barge, which as she claims was in the eastern portion of the channel, she proceeded too close to the eastern bank thereof, smelled bottom, and as a result the ship failed to respond to her helm, and took the sheer mentioned, bringing about the disaster.

"The *Hamilton* was charged with knowledge of the width of the channel, of the danger of proceeding too close to its banks, and especially so at a high rate of speed, as she would thereby the more quickly smell bottom. Good seamanship required that she should have anticipated these dangers, and in no case should she have taken a chance to pass this incumbered vessel at full speed in the night time, without knowing whether there was ample room for her to do so; and she cannot avoid the consequences of the collision, arising from these obvious omis-

sions on her part, nor call upon others, themselves free from fault, to share her losses.”

To the same effect

*The Monroe C. Smith*, 201 Fed. 569, 572.

#### NO SUCTION.

The admitted facts of the case demonstrate that there was no suction. Captain Sullivan (Apostles 203-204) explains the cause and effect of suction:

“A. \* \* \* The suction is at the stern of a ship; in passing a shoal it is the stern of the ship that sucks towards the shore, not the bow, and of course the stern going towards the shore, the bow naturally goes in the course in which the suction is causing the ship to draw, and we say that she runs away from shore. The fact of the matter is, that the stern is drawn toward the shore by this action, probably by the propellor, being the largest moving object around, displacing the water, and the bow following the course of the suction has caused this bow to draw. Of course if she is moving—the faster she is moving the faster she will go off in that direction; the faster—the further the influence would be on the suction.

Q. The faster the vessel is going, the greater the influence of the suction?

A. Yes, sir.”

Captain Sandstrom testifies (Apostles 171-172) that suction could not influence a vessel if it is

headed towards the shore or nearly so. The admitted facts of the case and the photographs in evidence show that the "West Keats" at her starboard hawse pipe, four or five feet back from her bow, collided with the starboard quarter of the "Boston Maru." This indisputable fact shows that the "West Keats" at the time of the collision was headed toward the Oregon shore. She could not otherwise have struck the "Boston Maru" on the starboard side of the former vessel. Captain Sullivan (201-205, 211) and Captain Allyn (264-265) ("Boston Maru" Exhibit "N") testify as to the conclusions to be drawn from the physical facts of the accident which are beyond all dispute. Captain Berry, the pilot of the "West Keats," refuses to testify as to whether his stern or his bow was closest to the Oregon shore at and before the time of the accident (Apostles 133-134). He is wholly unable to explain the collision on the theory of suction if the bow of the "West Keats" was closer to the shore than her stern, and the physical facts demonstrate that this was the case.

It must be conceded that the "West Keats" ran into the "Boston Maru," although the latter vessel was visible for three miles up the river and was actually observed by the pilot of the "West Keats" two miles above the place of collision. The "West Keats" approached at full speed although her pilot admits he was uncertain what the lights ahead meant. One mile above the place of the collision the pilot of the "West Keats" recognized

the lights as those of a vessel at anchor whose stern was in the direction of the Oregon shore. He nevertheless proceeded at full speed until one minute before the collision. The physical facts demonstrate that it was possible for the "West Keats" to pass between the "Boston Maru" and the Oregon shore. It was also possible for her to comply with her statutory duty under Section 7899 Compiled Statutes, and pass to the Washington side of the "Boston Maru." It is argued that to pass to the Washington side of the "Boston Maru" would require the "West Keats" to get off her ranges, but the evidence is that for at least half a mile at the place of the collision there is no range to be followed (Berry 104).

On the whole case we contend that this appellant has signally failed to show manifest error in the conclusions of the District Court.

### APPELLANT'S AUTHORITIES

We invite the following suggestions with reference to the authorities cited on behalf of appellant.

*The Europe*, 190 Fed. 475.

In this case, and at page 476 of the report, the court said:

"At the time of the collision the *Europe* was anchored in the deep-water channel of the Willamette River, and in the usual track of vessels plying up and down the river."

## VIOLATION OF HARBOR REGULATIONS.

Several of the cases relied upon by appellant are cases where the decision of the court turned on the fact that the anchored vessel was violating harbor regulations.

In *The Margaret J. Sanford*, 203 Fed. 331, and in *U. S. v. St. Louis Transportation Co.*, 184 U. S. 248, the anchored vessel had violated a port rule requiring all vessels to report to the harbor master and to be assigned a place for anchorage.

In *The Belfast*, 226 Fed. 362, the vessel in question was anchored at the entrance of Boston harbor in violation of one of the harbor regulations. She remained at the prohibited anchorage ground after having been notified by the proper authorities to move.

## LIGHT DRAFT VESSELS.

In *The Itasca*, 117 Fed. 885, and *The City of Birmingham*, 138 Fed. 555, the anchored vessels were dredges of light draft which could anchor almost anywhere in safety. Their situation is very different from that of a vessel heavily loaded and drawing twenty-six feet one inch of water.

## FACTS DISTINGUISHABLE.

In *Culbertson v. Shaw*, 18 How. 584, a flatboat was tied to the bank. A steamer endeavoring to land collided with the flatboat and was held liable for all the damages.

In *The John H. Starin*, 122 Fed. 236, the anchored vessel was held liable because of her failure to keep her riding lights burning. The evidence is clear and uncontradicted that the riding lights of the "Boston Maru" were burning brightly at all times.

In *The Ogemaw*, 32 Fed. 919, the anchored vessel was held liable for failure to take steps to avoid the collision after the danger became apparent. The principle announced in this case is not applicable to the facts in the case at bar. The pilot and master of the "West Keats" did not expect a collision until one minute before the impact. The "Boston Maru" could not anticipate a collision at any earlier time, and there was nothing which its master or pilot could do to avert the collision after the danger became apparent.

Respectfully submitted,

MCCAMANT & THOMPSON,  
RALPH H. KING,

*Proctors for Appellee.*



In the  
**United States Circuit Court of Appeals**

For the Ninth Circuit

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THE JAPANESE STEAMSHIP "BOSTON MARU"

---

*Appeal from the United States District Court, for  
the District of Oregon*

---

**Appellant's Reply Brief**

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HON. ROBERT S. BEAN, *Judge*

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GEORGE NEUNER, *United States Attorney*, and  
MACCORMAC SNOW,

*Proctors for Appellant.*

MCCAMANT & THOMPSON and  
RALPH H. KING,

*Proctors for Appellee.*

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APPEAL NOT A SHADOW

The bare facts of these cases are not greatly in dispute. Conflicts relate principally to the minor issues and to small differences of expert opinion among the pilots. The issues contested between respective counsel largely have to do with conclusions drawn from the testimony. The Appellate Court is not concerned to a great extent with the credibility of witnesses and their demeanor on the stand. The problem of this Court is to take up the various threads of testimony and draw therefrom just conclusions of law. Therefor the cases cited on pages 20-22 of Appellee's brief are not particularly applicable.

*The Ariadne*, 13 Wall. 475, 479:

We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer.

Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a presumption, *prima facie*, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect.

*The Columbian*, 100 Fed. 991, 996:

. . . On the other hand, it sometimes happens that the judge of the first instance receives misleading impressions with reference to the weight to be given the testimony; and it also sometimes happens that a court which has a printed record, and thus can easily balance one portion of the proofs against another, derives advantages superior to any which the instance judge can derive from a personal inspection of the witnesses.

#### JUDGE BEAN'S OPINION

Appellee has departed from the apostles by including in its brief a copy of the opinion of the trial court. We are perhaps justified in going

beyond them to say that this opinion could not appear in the apostles because the Court did not cause it to be filed and it forms no part of the record in the District Court.

### STAGE OF WATER

Appellee twice quotes Captain Gildez (Appellee's Brief 5, 26) to the effect that at the time of the collision the water was "about one foot" above low water. He was of course attempting to state the results of Government observations. Hickson stated them first hand and said the stage of water was one and one half feet above zero (A 89) (Our brief 48).

### KNOWLEDGE REQUIRED OF GILDEZ

On pages 26-27 of its brief Appellee, we think, understates the degree of skill and knowledge required of Captain Gildez in selecting his anchorage and overstates the amount of reliance which the law permits him to place upon an antiquated chart.

The alleged shoal had undoubtedly disappeared for all practical purposes more than two years before the collision (Our brief 48-49). Counsel says in effect (Appellee's brief 27) that common sense says the shoal would never wash away. We believe it is common knowledge that the current of a river tends to smooth out the humps and bumps on its bottom, and that we could support this statement by reference to learned works on

physical geography. This is unnecessary, however, for Mr. Hickson, who has had eighteen years' experience noting the action of the current of the Columbia River on its shoals and bars, not only said the shoal would wash away but stated the time required in the process, namely, "a year or so" (A 71). The court will judicially recall the jetties at the mouth of the Columbia and will also be informed by the chart in evidence and by its own judicial knowledge that an important method of dredging the Columbia River channel is the construction of jetties at such points that they will cause the current to do the work.

*Atlee vs. Packet Co.*, 21 Wall. 389, 396.

*Davidson Steamship Co. vs. United States*,  
205 U. S. 187, 193.

The Supreme Court in these cases has outlined something of the extent of knowledge and skill required of a pilot. He must know channels, currents, obstructions, bars, landmarks and other physical conditions. To gain this information he has access to charts and other Government data, but the main source is practice, observation and experience. In the last named case a pilot damaged a Government breakwater through reliance upon an old chart and in disregard of facts which he could have learned by observation and through later Government circulars. The ship-owner was held liable.



## UNIFORMITY OF CUSTOM

Appellee claims we have not shown uniformity as to the customary anchorage and relies on two classes of evidence: First, that the anchorage in question was in accordance with the practice of pilots Moran, Allyn, and Sullivan (Appellee's brief 33); and secondly, that only at Oak Point or Longview do pilots turn out to anchor away from the customary track of navigating vessels (Appellee's brief 25).

Captain Moran, a witness for respondent (A 257), said on cross examination that a pilot sometimes will drop anchor anywhere if he only intends to stay for a few hours. He did not say whether he referred to day or night and did not testify that it was customary to anchor where the Boston Maru was placed or out of the regular anchorage and go to sleep leaving a vessel there all night with a flood tide in prospect. Moran stated definitely that he ordinarily anchored five or six hundred feet farther out than where the Boston Maru was anchored (A 256) and abreast of Columbia City Front.

Captain Allyn, a witness for respondent, said on direct (A 259) that the Boston Maru was "over near the place where he would anchor." He was not asked on direct where he would anchor. At the opening of his cross examination he stated definitely that he would anchor opposite Columbia City Front on the Lamonts-Caples Point line. This would place him some four hundred feet

below and about eight hundred fifty feet easterly from the amidships of the Boston Maru at the time of the collision.

The statement of Captain Sullivan, witness for Appellee, that vessels are customarily anchored "in the vicinity" of the Boston Maru (A 197) is too vague to break down more specific testimony on custom. The captain knew of the wide use by other pilots of the Red Range (A 221), although he had not anchored at Columbia City since prior to establishment of the Red Light at 27-2 in April, 1923 (A 223).

We submit that the incidental remarks of these three witnesses do not refute the testimony on uniformity.

The testimony as to Oak Point or Quinns and Longview is merely to the effect that at these places a ship can anchor farther away from the main channel than at others. This does not tend to show that it is not customary to anchor as far as possible from the main channel at Columbia City.

Captain Dalby (Baldy) said, referring to the Lamonts-Courthouse line opposite or a little below Columbia City Front (A 151):

. . . Some places along that river we have places to anchor, and generally swing to one side there and anchor. This is one of the places as long as the atmosphere is clear, as a rule, we go out to the anchorage grounds.

## NO REGULATION FOR WARNING

Appellee contends that because no statute requires an anchored vessel to blow whistles the Boston Maru is to be excused for not having done so. We remind the court that the Boston Maru was in an unusual, dangerous and deceptive location. The cases require precaution commensurate with the dangers she created (Appellant's brief 67).

Article 29 of the Inland Rules, being section 7903 Compiled Statutes, provides as follows:

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, *or by the special circumstances of the case.*

DISTANCE OF BOSTON MARU FROM SHORE—  
SUCTION—DIRECTION OF WEST KEATS

Appellee states and assumes on page 24 of its brief that the Boston Maru would swing on the radius not appreciably greater than 400 feet and that her stern would therefor be 250 feet from the deep water line along the Oregon shore. With this assumption, our dividers describe the distance as 175 feet if the bearing of the bow was incorrect and 125 feet if it was correct (Our brief 14-15).

But we contend that the record does not contain any definite answer to the question how far a vessel will stretch out her anchor chain when swinging on a changing current, and that in the nature of things there can be no definite answer (Berry 120). Captain Allyn, a witness for the Boston Maru, said on direct (A 261):

Q. When it does swing, the radius of the arc on which it swings is what?

A. That would be a hard thing to say, because you never know what the wind or tide conditions are.

. . . . .

Q. Now, would the radius of the arc on which the vessel swings be much in excess of the length of the vessel?

A. That I couldn't say; I don't know.

Peculiarities of currents at different times, places and conditions are such that it would indeed be hard to phrase a law governing all circumstances. The record indicates that no vessel ever before swung on her anchor chain in the same place that the Boston Maru swung on the night of the collision. To determine how the chain led calls for consideration of other evidence.

Counsel says (Appellant's brief page 58) that we contend that the bow of the West Keats sheared to starboard. We could not properly make such a contention as there is no evidence whatever to support it. What we desired to say

on page 89 of our main brief is that the suction counteracted the starboard helm and the West Keats went straight and neither answered to her starboard helm nor sheered in response to the suction. This is in accordance with the undisputed testimony of Berry and Gillette (A 109, A 422).

The latter said in reference to the hard-a-starboard order (A 422):

Q. Did the ship obey her helm?

A. No, sir.

Q. Which way did it go?

A. Kept right going straight ahead.

Appellee contends that the West Keats was going toward the Oregon shore at the time of the collision and that there was no suction. If so, why did not the hard-a-starboard helm take hold and why did not the Keats run ashore? It is impossible to conclude there was no suction unless Berry and Gillette are incapable of belief.

The only conclusion is that the stern of the Boston Maru was fairly close to the six fathom line although more than 300 feet from the Oregon shore.

## WARRIOR ROCK AND ST. HELENS JETTY LIGHT, 28-2

Appellee showed that there was nothing in particular to obstruct the line of vision from

Warrior Rock to the place of collision and inferred that Berry should have been on his guard as to the situation when he passed Warrior Rock. This sounds reasonable at first blush but the pilots placed on the stand by respondent did not bear out the idea. Captain Moran did not make out the lights of the Boston Maru until after he left the end of the St. Helens Jetty (A 248). Captain Allyn, Appellee's witness, pointed out on *direct examination* (A 262) that a pilot would be too busy looking at his course after passing Warrior Rock and that he would not have an unobstructed view of the lower river until after he passed the St. Helens jetty light at 28.2. No pilot even suggested that Berry should have made the lights of the Boston before he did. The law requires these lights to be visible for only one mile (Inland Rules, Art. 11).

Berry made the lights of the Boston when about at 28.2 (A 101). Page 61 of Appellee's brief contains a statement that Berry admits he was then uncertain what the lights meant. We see no such admission in his testimony. He said clearly (A 103) that he then thought she was in the regular anchorage.

No pilot gave testimony tending to throw doubt on the reasonableness of Berry's then belief that the Boston was in the usual anchorage. The real question under the expert testimony was whether Berry could reasonably be expected to

know the unusual location of the Boston fairly accurately, not at a mile or more, but at 2000 feet.

Looking at the stretch of water from 28.2 to the end of the St. Helens bar range the Court will note that the Boston Maru was not straight ahead but partly around a curve and that the angle subtended by a line from that vessel to the regular anchorage is very small.

#### “BERRY SHOULD HAVE SLOWED DOWN”

In giving special emphasis to this theory, Appellee assumes knowledge by Berry (or liability to be charged with knowledge) either of the location of the Boston Maru or else that he did not know her location. It is undisputed in the record that he did not know her location until he was comparatively close to her, that he did not realize she was out of the anchorage until after he had turned off the St. Helens bar range (Our brief p. 88) and was headed toward her, and that the knowledge that she was close to the shore *was borne upon him gradually rather than abruptly*. The issue is not what he knew but what he should have known and the reasonableness of his judgment.

In considering the effect of slowing down the Court will remember that there is an abundance of uncontradicted testimony in the record that:

(1) The West Keats steers best at full speed ahead.

(2) With her engines stopped she does not steer well.

(3) When her engines are stopped at full speed she would travel three or four miles on her own momentum if she could be kept going straight.

(4) When she is going ahead and her engines are set astern her bow swings to starboard. The amount and angle of her swing or sheer depends on speed and other factors and its uncertain and variable.

It is pertinent to ask *where, when, why and how* he should have slowed up. If Berry had known or suspected the location of the Boston at a mile distant or even at a half a mile it would have been easier and safer for him to have left the ranges and proceeded on the Washington side. Slowing up would have meant merely loss of rudder power and there was no possible reason for it. Other pilots do not slow up for a ship at anchor at this point (McNelly 279).

Inside half a mile the idea of slowing up involves doubts and dangers. By proceeding half ahead or stopping his engines he would lose less or more steerage power without losing a great deal of way. The testimony of Captain Sandstrom is very clear on this point, and is uncontradicted (A 166-7):

COURT: Now suppose a careful navigator coming up the river or down the river, I



think it was, should notice in the channel, athwart the channel, a vessel at anchor two thousand feet away from him, what would be the proper course, reasonable and proper course, for the navigator to pursue?

A. When he was down that far the most reasonable course that he would proceed on the Oregon side, to go by on that side.

COURT: As long as he saw clearance, he wouldn't be expected to slow down, stop the speed of his boat?

A. No, that would probably be a worse thing to do.

COURT: Why?

A. Because he would lose control of his ship immediately he stopped the propeller. This class of vessels the minute you stop the propeller won't steer two lengths themselves.

COURT: How far would it go on its own momentum?

A. If she would run perfectly straight she would probably go three or four miles on her own momentum.

Again, inside a half a mile, Berry might have set the engines full or half astern. If he had done this when close to the Boston, say less than a thousand feet, the testimony shows with considerable certainty that he would have hit her head on. At greater distances the results of an astern maneuver are altogether speculative. He might have hit the Boston head on or broadside

or with his stern, or he might have passed her bow safely and fouled her anchor chain, or he might have passed bow and anchor chain and gone ashore on the Washington side, or he might have passed safely and succeeded in turning back into the river.

This much is certain from the expert testimony, that no pilot will set a vessel like the Keats from full ahead to astern suddenly except in an emergency and with plenty of river to turn in. No such emergency ever existed in this case before the collision either in Berry's mind or in fact.

We confidently assert that all speculation as to when, where, how and why Berry might have avoided the collision by slowing up results in zero. The idea of slowing up, first applied to a lay mind, finds ready and eager acceptance, but it does not bear analysis when exhibited in the light of the pilots' testimony.

When counsel argues that Berry should have slowed up he first assumes that Berry knew the Boston Maru was out of the anchorage before he did or became doubtful of her position before he did. Berry testified that he thought she was in the anchorage when he first made her lights about at 28.2 (A 103) and when he made the turn off the St. Helens bar range about half a mile from her (A 108), and that he gradually, not suddenly, became aware that she was out of place (A 108). His course confirms the truth of his testimony.

It might be argued that he should have known her position before he did, but counsel does not emphasize this point and the testimony is the other way. Sandstrom (164) said he could reasonably locate her at 2150 feet or less depending on the darkness. Grunstad said the same as to 2000 feet (A 179-80). Sullivan, Appellee's chief expert witness, said he might get within 1000 feet and still be easily mistaken as to her position (A 209). At 1000 feet Berry had become fully aware of the situation and was probably getting ready to stop his engines (Our brief 90). Dalby, who saw the Boston Maru just after the collision, and knew more about the facts than the other experts says (A 151):

Q. Suppose you had been on the "West Keats" in his place; at what point do you think you could have determined where the "Boston Maru" was anchored.

A. Well, I wouldn't probably have turned out (determined it?) much quicker than he did, because naturally we would think the vessel was anchored over where she was anchored in clear weather. I never seen a ship anchored there in my life in clear weather.

Again, when counsel argues that Berry should have slowed up, he devotes considerable space to *dicta* of the courts but practically none to the testimony. We think the latter should have precedence. The problem is specialized and localized. Also, the exact method of handling a ship, as distinguished from general rules of naviga-

tion, is a subject of technical knowledge rather than law.

## NARROW CHANNEL RULE A PASSING RULE

On pages 95 to 101 of our main brief we contend that Article 25 of the Inland Rules does not apply to the case, broadly for three reasons:

(1) The narrow channel rule is flexible and should not receive a construction that condemns the use of Government-established ranges;

(2) The rule recognizes anchorages and navigating channels existing side by side, and the navigator is not required to leave the customary navigating channel and invade the customary anchorage when the latter lies to the right of the former; and

(3) The narrow channel rule is a passing rule and does not apply in respect to ships at anchor, especially when anchored in violation of the anchorage statute.

Counsel take issue with us on only the third contention and claim that the narrow channel rule applies to anchored as well as navigating vessels, citing the following cases on page 55 of their brief:

*The Kathleen Tracy*, 296 Fed. 711.

*Bisso Towboat Co. v. U. S.*, 6 F. (2d) 132.

*Occidental Company v. Smith*, 74 Fed. 261.

The two cases last named involve passing vessels and not anchorage.

In *The Kathleen Tracy* the steamer Lake Ledan dragged off the general anchorage in a gale. Her officers met the situation and the Court commends their action. Arrived at a safe place between two channels they veered more chain and dropped another anchor which held her. The Court says:

I can think of no better place to lay up the steamer under the circumstances so far as navigation is concerned.

. . . . .

This is a fixed and pivotal fact in the case.

. . . . .

I do not think that the Lake Ledan was an obstruction to navigation.

The tug Tracy passed to her left of another tug with carfloats, and her tows fouled the Lake Ledan's anchor chain. The Court holds the Tracy at fault in three particulars:

1. Her lookout did not see the lights of the carfloat tug until too late to cross and pass to the right of her (as required by Article 18 of the Inland Rules);

2. Her master admits he did not see the Lake Ledan's anchor lights as early as he should have; and

3. The Tracy did not keep on the right hand side of the channel.

It will be seen that the narrow channel rule was here invoked as between the Tracy and the carfloat tug. If the Tracy had seen the lights of the Lake Ledan and the carfloat tug soon enough to pass the latter port to port as required by Article 18, and had thus followed the narrow channel rule, she would not have fouled the Lake Ledan. We believe that as far as the narrow channel rule is concerned *The Kathleen Tracy* is a passing and not an anchorage case.

The only cases we know of referring to the narrow channel rule strictly in connection with anchored vessels hold that the rule does not apply in anchorage cases, especially where the anchored vessel is improperly placed. These cases are cited on pages 100-101 of our main brief and are:

*The John H. Starin*, 122 Fed. 236, 239, and  
*The Belfast*, 226 Fed. 362, 366.

## CONTENTIONS RESPECTING WEST KEATS

We contend, first, that no fault of commission or omission on Berry's part is shown by a preponderance of the evidence, and second, that a preponderance of the evidence upholds his conduct.

There was no evidence that he should reasonably have made out the lights of the Boston Maru before he did. At that time he believed the Boston was in the usual anchorage. Much evidence tends to show that this belief was reasonable, and there was none to the contrary. There

is no testimony whatever tending to prove that he should reasonably have known the Boston was out of place until after he turned off the St. Helens bar range and he did not know it then. It is natural under the circumstances that the information that she was off the anchorage and fairly close to the Oregon bank should have come to him gradually and not in the form of a sudden shock.

The consensus of opinion of the pilots is that he should reasonably have been able to determine her position pretty accurately at about 2000 feet or closer, depending on the degree of darkness.

The composite judgment of the pilots was that a turn at 2000 feet to the Washington side would have been sharp, unusual and dangerous.

Any slowing or stoppage of his engines would have resulted in a loss of steering power. No witness gave testimony tending to prove that a half speed, slow ahead, stop or astern bell would have been helpful or even safe at any time. There was much testimony directly to the contrary, especially that showing the effect of slowing, stopping and backing the engines. After turning off the range any slowing would have been useless and even dangerous as the record shows without contradiction. Berry held at full speed getting all the purchase possible on the hard-a-starboard helm until he saw that the rudder would not take hold. Then he stopped the

engines and held his helm hard-a-starboard until after the collision.

This stoppage is not criticised or charged as negligence.

Berry might have avoided the collision by an unusually shrewd and lucky guess at the location of the Boston Maru, or by a spectacular and dangerous turn of doubtful necessity, if the same resulted successfully, but the law does not demand either of these.

The things which Captain Berry actually did are well known and are not particularly criticised. Criticism consists of pointing out things which he did not do but might have done. With a chart before one showing the event in plain lines it is easy to say that if Berry had done thus or so he could have avoided the collision. But the question is whether he acted with reasonable prudence.

*The Nevada*, 106 U. S. 154, 157.

The canal boat Kate Green came into a slip just as the Nevada was about to leave and made fast to the Hart, another canal boat. Suction of the Nevada's propeller broke the Hart's fastenings to the slip and the Kate Green was damaged. The Nevada was at fault for not keeping a look-out aft. Referring to those on board the Kate Green, Mr. Justice Bradley said:



. . . It was reasonable for them to suppose that the fastening of the "C. H. Hart" was secure. They could not know that it would break. It was that break which set them adrift, subject to the suction caused by the motion of the "Nevada's" propeller. Their own fastenings were sufficient. We do not see how the court could find otherwise than that they were free from fault or negligence. Perhaps they might have done something else which would have been better. *The event is always a great teacher.* They might have stayed out in the river and not entered the slip; or, having entered, they might have gone back to the bulkhead, and stayed there till the "Nevada" left. But these possibilities are not the criteria by which they are to be judged. *The question is, Did they do all that reasonable prudence required them to do under the circumstances?* And this question, we think, must be answered in the affirmative.

*Carscallon vs. Coeur D'Alene Co.* (Ida.),  
98 Pac. 622.

*Pittsburgh & Erie Coal Co. vs. George Urban Milling Co.*, 226 Fed. 332, 334.

*The R. P. Fitzgerald*, 212 Fed. 678, 684.

## POINTS AND AUTHORITIES

Anchorage obstructing or preventing passage of other craft is unlawful.

Act of March 3, 1899 Compiled Statutes P.  
9920.

*The Europe* (CCA 9th), 190 F. 475.

*The Caldys*, 153 F. 837.

*The Hilton*, 213 F. 997.

*The Itasca*, 117 F. 885.

*The Bern*, 255 F. 235.

Anchorage contrary to regulation or custom is unlawful.

*Culbertson v. Shaw*, 18 How. 584.

*U. S. v. St. Louis Co.*, 184 U. S. 247.

*The Sandford-Strathleven*, 203 F. 331; 213 F. 975.

*Graves v. Lake Michigan Ferry Co.*, 183 F. 378.

*The Admiral Cecille*, 134 F. 673.

Anchorage on or near a range is wrongful.

*City of Birmingham*, 183 F. 559.

*The Milligan*, 12 F. 338.

*The Belfast*, 226 F. 362.

Precautions of anchored vessel should be proportionate to the perils assumed.

*The Ogemaw*, 32 F. 919.

*The Starin*, 122 F. 236.

Article 29, Inland Rules; Compiled Statutes P. 7903.

Where a vessel improperly anchored is run into the burden of proof is upon her to show the moving vessel at fault.

*The Clara*, 102 U. S. 200, 202.

*The Starin*, 122 F. 236.

- The Prudence*, 212 F. 537.  
*The Miner*, 260 F. 901.  
*The Europe*, 175 F. 596, 190 F. 475.  
*The Belfast*, 226 F. 366.  
*Graves v. Lake Michigan Co.*, 183 F. 378.  
*The Sandford-Strathleven*, 203 F. 331.  
*The Nereus*, 23 F. 448.  
*The Oregon*, 158 U. S. 186.

The narrow channel rule is flexible and does not forbid use of ranges.

- The Klatawaw*, 266 F. 120.  
*The G. S. Tice*, 287 F. 127.  
*The Three Brothers*, 170 F. 48.  
*Transfer No. 21*, 248 F. 459.

The narrow channel rule recognizes anchorages and navigating channels side by side and does not require leaving the channel and invading the anchorage.

- The Bee*, 138 F. 303.  
*The La Bretagne*, 179 F. 286.  
*The Randolph*, 200 F. 96.

The narrow channel rule relates to passing of navigating and not anchored vessels.

- The John H. Starin*, 122 F. 236.  
*The Belfast*, 226 F. 362.

Is the last clear chance doctrine the law of this court sitting in admiralty?

*The Yucatan*, 236 F. 436.

*American Hawaiian Co. v. King Coal Co.*,  
11 F. 2nd 41.

*The Miner*, 260 F. 901.

*The Waterford*, 6 F. 2nd 980.

*The Kathleen Tracy*, 296 F. 711.

*The Daniel McAllister*, 258 F. 594.

Appeal on conclusions to be drawn from facts is not a shadow but a substantial right.

*The Adriane*, 13 Wal. 475.

*The Columbian*, 100 F. 991.

Degree of skill and knowledge required of a pilot.

*Atlee v. Packet Co.*, 21 Wal. 389.

*Davidson S. S. Co. v. U. S.*, 205 U. S. 187.

The basis of negligence is whether reasonable prudence was exercised, not possibilities indicated by the event.

*The Nevada*, 106 U. S. 154.

*Carscallen v. Coeur D'Alene Co. (Ida.)*, 98  
Pac. 622.

Respectfully submitted,

GEORGE NEUNER,

United States Attorney,

WILLIAM G. MUNLY,

District Counsel,

U. S. Shipping Board,

MACCORMAC SNOW,

*Proctors for Appellant.*

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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ELIZABETH B. RUSSELL, Bankrupt,  
Petitioner,

vs.

HUBERT F. LAUGHARN, as Trustee in Bank-  
ruptcy of the Estate of ELIZABETH B.  
RUSSELL, Bankrupt,  
Respondent.

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**P**etition for **R**evision

Under Section 24b of the Bankruptcy Act of Congress,  
Approved July 1, 1898, to Revise, in Matter of Law,  
an Order of the United States District Court  
for the Southern District of Califor-  
nia, Southern Division.

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FILED  
APR 1 1927  
F. W. MORGENTHAU  
CLERK



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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

For Petitioner:

J. W. MORIN, Esq., of MORIN, NEWELL &  
BROWN, 723 Pacific-Southwest Bank  
Building, Pasadena, California.

For Trustee:

HUBERT F. LAUGHARN, Esq., Trustee,  
*in propria persona*, Subway-Terminal  
Building, Los Angeles, California.

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In the United States Circuit Court of Appeals in  
and for the Ninth District.

IN BANKRUPTCY.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

PETITION TO REVISE IN MATTERS OF  
LAW AN ORDER REFUSING TO SET  
ASIDE CERTAIN PROPERTY AS EX-  
EMPT.

To the Honorable Judges of the United States Cir-  
cuit Court of Appeals in and for the Ninth  
District:

The petition of Elizabeth B. Russell respectfully  
represents:

I.

That she is and was at all times herein mentioned

the bankrupt herein. That she was adjudicated a bankrupt upon the 8th day of July, 1926.

## II.

That upon the 10th day of September, 1926, the Trustee herein, Herbert F. Laugharn, as Trustee of the Estate of said bankrupt, made his Report of Exempt Property, a copy of which is hereto attached, designated as Exhibit "A," and reference to said exhibit is hereby made and the same is hereby made a part of this petition. That in said report the Trustee refuses to set aside as exempt the following described property, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Record of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the Map of the Oakwood Tract, recorded in Book 9, page 33 of Maps, thence East parallel with the South line of said California [1\*] Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet

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\*Page-number appearing at the foot of page of original certified Petition for Revision.

to the point of the beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

although said property was exempt property under and by virtue of the effect of a certain Declaration of Homestead filed and recorded by the bankrupt on October 11, 1923, in Book 2718, at page 247 of Official Records, Los Angeles County, California.

### III.

That upon the 27th day of September, 1926, the said Elizabeth B. Russell, the bankrupt, did file in the matter of said bankruptcy proceedings her exceptions and objections to the Trustee's Report of Exempt Property, a copy of which is hereto annexed, marked Exhibit "B," and reference to said exhibit is hereby made and the same is hereby made a part of this petition.

### IV.

That thereafter, and on the 12th day of November, 1926, an order was made by the Referee, after due hearing, confirming said report of said Trustee on the subject of exempt property hereinbefore referred to, and that notice of the entry of said judgment by the Referee was issued by the said Referee on the 17th day of November, 1926, and a copy of said notice containing a copy of said order and judgment is hereto annexed, designated as Exhibit "C," and reference to said exhibit is hereby made and the same is hereby made a part of this petition.

### V.

That thereafter, and upon the 24th day of No-

vember, 1926, and within ten days after notice of the entry of the last-mentioned order and judgment of the Referee, the said Elizabeth B. Russell did file a Petition for Review of said Referee's order [2] (by United States District Court), a copy of which petition is hereto annexed, designated as Exhibit "D," and reference to said exhibit is hereby made and the same is hereby made a part of this petition.

#### VI.

That thereafter, and upon the 13th day of December, 1926, the Referee did file his Certificate on Petition for Review pertaining to said proceedings in the office of the District Court of the United States for the Southern District of California, Southern Division, and a copy of said petition is hereto annexed, designated Exhibit "E," and reference to the said exhibit is hereby made and the same is hereby made a part of this petition.

#### VII.

That thereafter and following upon the presentation of said matter before said District Court last mentioned, the said matter was submitted to said Court, and upon the 29th day of January, 1927, an order was entered in the said United States District Court referred to confirming the order of the Referee of the 12th day of November, 1926, hereinabove referred to, and a certified copy of the said order of said District Court is made and filed as a part hereof, marked Exhibit "F," and reference to said exhibit is hereby made and the same is hereby made a part of this petition.

VIII.

A copy of the appraisal showing the value of the property in controversy in these proceedings is attached hereto, designated Exhibit "G," and reference to said exhibit is hereby made and the same is hereby made a part of this petition.

IX.

Your petitioner further says that she is aggrieved by the order of said District Court confirming the order of the [3] Referee of November 12, 1926, and is injured thereby, and that errors have occurred in the matter of said order as follows:

1. That, though the property described in this petition is conceded to be a homestead, and exempt from execution, the Court, following the report of the Trustee and the Referee in refusing to set aside the same as exempt property, under the provisions of Chapters One and Two, Title V, Part Four, Division Two, Civil Code of the State of California, has erred in matters of law.

2. That the Court in refusing to set aside as exempt the real property involved in this petition, and in affirming the order of the Referee ordering the Trustee to bring proceedings to sell the property involved, free and clear of liens, and from the proceeds to pay the encumbrance on the property, the claim of homestead exemption of \$5,000.00 to the bankrupt, and to account to the bankrupt estate for the surplus over and above the said two amounts, has erred in a matter of law.

3. That the Court in affirming the order of the Referee, which order, while conceding that the right,

title and interest of the bankrupt in the homestead property, both at the time of the bankruptcy and at the time of the imposing of the homestead thereon, was of a value not in excess of \$3,000.00, yet should be sold, and the proceeds of the sale of the entire property, both the community interest and the separate property interest of the bankrupt, pooled together for determining the exemptions, and the excess, if any, over exemptions pooled and accounted for to the bankrupt estate, erred in a matter of law.

4. That the Court in affirming the order of the Trustee ordering that, although all excess of interest in the property over and above \$3,000.00 was in fact the community property of Rufus W. Russell, husband of the bankrupt, and not the property of the bankrupt and under no liability for her debts, yet [4] nevertheless to be subjected to the claims of the bankrupt estate, and in effect appropriated to the use of the bankrupt's creditors, erred in a matter of law.

5. The Court in affirming the order of the Referee holding that even though a homestead declared by the bankrupt upon a property interest worth not in excess of \$3,000.00, when followed by additional contributions of community funds from the husband's control made after the imposing of the homestead character in some manner converted said community contributions to the status of the separate property of the bankrupt, regardless of the fact that said contributions were not a gift to the bankrupt, and that the homestead exemption was not filed at a time after said community contribu-



tions were made to the homestead, erred in a matter of law.

6. The Court in affirming the order of the Referee, in effect holding that the imposition of a homestead character upon the property had the effect of pooling all contributions made to that investment after, as well as before, the recording of the homestead, and had the effect of altering the title to the homestead property itself from that of tenancy in common to some other tenancy, in substance the sole property of the bankrupt, even though the imposition of a homestead exemption does not of itself effect the title to property, but only gives the property certain characteristics regardless of the title to the property itself, erred in a matter of law.

7. The Court in affirming the order of the Referee in effect determining that the community property of the husband of the bankrupt should be applied to the payment of the debts of the wife contracted after marriage, erred in a matter of law.

WHEREFORE, petitioner prays that the said order of the said District Court be reviewed and revised in matters of law, and that said order be reversed, and for all proper [5] relief herein.

MORIN, NEWELL & BROWN,

By J. W. MORIN,

Attorneys for Elizabeth B. Russell, Bankrupt and  
Petitioner.

United States of America,  
 Southern District of California,  
 Southern Division,  
 County of Los Angeles,—ss.

Elizabeth B. Russell, being duly sworn, says: That she is the bankrupt in the foregoing proceedings, and is the petitioner in the within entitled matter. That she knows the contents of the foregoing Petition to Revise, and the same is true as she believes.

ELIZABETH B. RUSSELL.

Subscribed and sworn to before me this 26th day of February, 1927.

[Seal] JAMES WHEELER MORIN,  
 Notary Public in and for the County of Los Angeles, State of California. [6]

EXHIBIT "A."

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615-J.

In the Matter of ELIZABETH B. RUSSELL,  
 Bankrupt.

TRUSTEE'S REPORT OF EXEMPT PROPERTY.

At Los Angeles, California, on the 10th day of September, 1926.

The following is a schedule of property designated and set apart to be retained by the bankrupt aforesaid as his own property under the provisions of the Acts of Congress relating to Bankruptcy:

General Head.	Particular Description.	Value.
Military Uniforms, Arms and Equipment:		None
Property exempted under State Laws:		
	Wearing apparel .....	150.00
	Pictures .....	50.00
	2 Rings (pledged) .....	100.00
	1 Watch .....	25.00
	2 Pins .....	25.00
Claimed exempt under Section 690, C. C. P., State of California.		

The Trustee refuses to set aside as exempt the following described property, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the Map of the Oakwood Tract, recorded in Book 9, page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel [7] with the East line of

Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of the beginning. Also known as No. 590 E. Hudson Avenue, in the City of Pasadena, California.

Said property has a value of approximately \$14,000.00 and is encumbered to the extent of approximately \$7,000.00. Encumbrance is in favor of the Hogan Finance Company. Declaration of homestead has been filed upon said property. The Trustee alleges that the bankrupt estate has an interest in said property and that the same should not be set aside as exempt to the bankrupt.

HERBERT F. LAUGHARN,  
Trustee. [8]

### EXHIBIT "B."

In the District Court of the United States, Southern District of California, Southern Division.

No. 8615-J.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

### EXCEPTIONS AND OBJECTIONS TO TRUSTEE'S REPORT OF EXEMPT PROPERTY.

#### I.

Now comes Elizabeth B. Russell, of Pasadena, California, the above bankrupt, and excepts to the Trustee's report of exempt property filed herein

on or about the 10th day of September, 1926, in so far as in said report the Trustee refuses to set aside as exempt the following described property, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the Map of the Oakwood Tract, recorded in Book 9, page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of the beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

## II.

The bankrupt respectfully represents that error has been committed by the said Trustee in refusing to set aside as exempt the above-described property in this, that the said above-described real property and all the right, title and interest of the bankrupt therein is a homestead and is exempt from execution

under the provisions of Chapters 1 and 2, Title 5, Part 4, Division 2 of the [9] Civil Code of the State of California.

### III.

Bankrupt respectfully represents that on or about the 22d day of September, 1923, she entered into a contract in writing for the purchase of said described property from Hogan Company, the owner thereof, at the total agreed purchase price of \$14,500.00, payable in installments. \$2,000.00 was paid on said agreement on September 22, 1923, substantially all of which was the separate property of the bankrupt derived by her from distributive share in the estate of her mother who died some years before. Under the provisions of said agreement, the bankrupt was permitted to take possession of said property upon the execution of the agreement. The said property was at the time and still is improved with a single family dwelling-house and garage and the usual appurtenances of a dwelling-house and into said dwelling-house and to and upon said real property the said bankrupt, accompanied by her husband, Rufus W. Russell, and her daughter, Elizabeth Russell, moved on or about the 22d day of September, 1923.

### IV.

At all times herein mentioned the bankrupt was a married woman, the wife of Rufus W. Russell. At all times herein mentioned and for many years prior thereto, and at all times since, the bankrupt was and still is living together with the said Rufus W. Russell as husband and wife and at all times herein

mentioned said Elizabeth Russell was the daughter of said bankrupt and Rufus W. Russell and living with her said parents and dependent upon them for support.

## V.

That upon the 10th day of October, 1923, the bankrupt executed and acknowledged a declaration of homestead describing the property hereinabove described therein and claiming the same, together with the dwelling-house thereon and the appurtenances, as a [10] homestead. That said declaration showed that the declarant and claimant was a married woman; that the name of the husband was as hereinabove set forth; that the name of the daughter was as hereinabove set forth; that it contained a statement that at the time of the making of said declaration they all did actually reside on the premises hereinabove and therein described; that said declaration did further contain a statement that said husband had not made any declaration of homestead heretofore nor had the declarant, and that therefore this said declaration was made for the joint benefit of the said husband and the declarant. A statement of the actual cash value of said premises as estimated by declarant was also therein contained. The said declaration was thereafter and upon the 11th day of October, 1923, recorded in Book 2718, page 247, Official Records of Los Angeles County, California. A copy of said declaration is hereto annexed and designated Exhibit "A," and reference is hereby made to the same for further particulars, and it is hereby intended that said ex-

hibit shall be received with the same effect as if herein fully set out.

#### VI.

That all the matters and things contained in said declaration of homestead were true. That at the time the said bankrupt and her husband and daughter were all residing together upon said premises and intending to reside there permanently and the said bankrupt and her said husband have continued at all times since to reside and are still residing in and upon said premises as their permanent home.

#### VII.

That at the time of the recording of said declaration of homestead there were no judgments either rendered or entered against the claimant or her husband and no liens or other encumbrances against said property so far as any creditor or claimant is concerned. [11]

#### VIII.

That on or about the 24th day of September, 1923, the bankrupt borrowed, without security, the sum of \$1,000.00 from a friend, Mrs. Florence Hartman, and paid said sum upon said contract purchase for said above described real property, and that thereafter from time to time additional payments were made subsequent to the recording of said declaration of homestead upon said contract, but that all of said payments were made from community funds of Rufus W. Russell and said bankrupt. That said funds were appropriated by said bankrupt out of community funds which were subject to the actual



possession of bankrupt without specific authority of Rufus W. Russell and there was no intention expressed or assumed on the part of Rufus W. Russell either to make a gift of any of said sums of money to the bankrupt or to lend to her any such sums of money, but it was at all times referred to as the intention of bankrupt to credit the community with such proportionate interest in said property as the community funds therein invested bore to the separate funds of the bankrupt therein invested. That the total payments made upon said purchase price contract of said homestead property is \$7,500.00; that the total value of the interest in said property comprising both the separate interest of the bankrupt and the community interest therein is not in excess of the same amount and that there has at no time been any additional investment therein at the bankrupt out of her separate funds except the said initial payment of not exceeding \$2,000.00, and the bankrupt therefore respectfully represents and avers that the total value of the separate property interest of said bankrupt in said homestead property is not in excess of \$2,000.00.

WHEREFORE, bankrupt contends that all the right, title and interest of the said bankrupt, Elizabeth B. Russell, in or to said real property above described should be set aside as exempt property under the provisions of law in such cases made and provided [12] and that an order should be made to that effect herein.

ELIZABETH B. RUSSELL.

State of California,  
County of Los Angeles,—ss.

I, Elizabeth B. Russell, the bankrupt debtor hereinabove mentioned, being duly sworn do depose and say: That I have read the foregoing Exceptions and Objections to Trustee's Report of Exempt Property and hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

ELIZABETH B. RUSSELL.

Subscribed and sworn to before me this — day of September, 1926.

[Seal]                    JAMES WHEELER MORIN,  
Notary Public in and for the County of Los Angeles,  
State of California. [13]

### EXHIBIT "A."

#### DECLARATION OF HOMESTEAD.

KNOW ALL MEN BY THESE PRESENTS: That I, Elizabeth B. Russell, hereby declare that I am the wife of Rufus W. Russell; that said Rufus W. Russell is the head of the family consisting of himself, myself, the undersigned, and an adult daughter, Elizabeth Russell by name; that I do now at the time of making this declaration, actually reside, together with my said husband and daughter, on the premises hereinafter described; that my husband has not made any declaration of homestead heretofore, nor have I, and I therefore make

this declaration for the joint benefit of my said husband above named, and myself; that the premises on which I reside are described as follows:

Lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit:

That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous records of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the map of the Oakwood Tract, recorded in Book 9, Page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of the beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

That I do by these presents claim the premises above described, together with the dwelling-house thereon, and the appurtenances as a homestead; that the actual value of said premises I estimate to be \$14,000.00.

IN WITNESS WHEREOF, I the said Elizabeth B. Russell, have hereunto set my hand and seal this 10th day of October, 1923.

ELIZABETH B. RUSSELL. (Seal) [14]

State of California,  
County of Los Angeles,—ss.

On this 10th day of October, 1923, before me, James Wheeler Morin, a notary public in and for said County and State, personally appeared Elizabeth B. Russell, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

[Seal]            JAMES WHEELER MORIN,  
Notary Public in and for the County of Los Angeles,  
State of California.

Recorded October 11, 1923, 33 min. past 1 P. M., in Book 2718, at page 247 of Official Records, Los Angeles County, Cal. C. L. Logan, County Recorder. I certify that I have correctly transcribed this document in above mentioned book. G. E. Fewel, Copyist, County Recorder's Office, L. A. Co., Cal. [15]

EXHIBIT "C."

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615—J.

In the Matter of ELISABETH B. RUSSELL,  
Bankrupt.

NOTICE OF ENTRY OF JUDGMENT.

To Hubert F. Laugharn, Esq., Trustee Herein, Subway Terminal Bldg., Los Angeles, California, and to Elizabeth B. Russell, Bankrupt Herein, Care of Morin, Newell & Brown (J. W. Morin, of Counsel), Pacific-Southwest Bank Bldg., Pasadena, California, and to Morin, Newell & Brown, Attorneys for Said Bankrupt, Pacific-Southwest Bank Bldg., Pasadena, California.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on the 12th day of November, 1926, an order was made and entered herein, to which order you are referred for further particulars, reading in part as follows:

“. . . . NOW IT IS ORDERED that the said report of exemptions and the setting apart of the said property therein described to the bankrupt as exempt be and it hereby is approved so far as it relates to the following particular articles of property:

Wearing apparel .....	\$150.00
Pictures .....	50.00
2 Rings (pledged) .....	100.00
1 Watch .....	25.00
2 Pins .....	25.00

AND IT IS FURTHER ORDERED that the trustee's report refusing to set aside the following described property as exempt, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit: That portion of Lot 2, in Block 'Q' of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the map of the Oakwood Tract, reported in Book 9, page 73 of Maps, thence [16] east parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet, thence West parallel with the South line of California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

is approved, and the Referee finds that the said property is worth approximately \$14,000.00, with an encumbrance of approximately \$7,000.00; that

the bankrupt is entitled to a claim of exemption by virtue of a declaration of homestead having been filed upon the said property to the extent of \$5,000.00; that the bankrupt estate is entitled to receive the difference between the total of the \$7,000.00 encumbrance plus interest and that the \$5,000.00 claim of homestead and the value of the property; and in accordance with the opinion of the Referee of October 1, 1926, the trustee is ordered to bring proceedings to sell the said property free and clear of liens and from the proceeds pay the said encumbrance plus interest and the claim of \$5,000.00 to the bankrupt, and account to the bankrupt estate for the surplus over and above the two said amounts."

Under Rule 84 of the said District Court, any persons *interest* feeling aggrieved by said order may review the same by petition therefor filed within ten days.

Dated: November 17th, 1926.

EARLE E. MOSS,  
Referee in Bankruptcy.  
By LOUISE HUDSON,  
Bankruptcy Clerk. [17]

## EXHIBIT "D."

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615—J.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

PETITION FOR REVIEW OF REFEREE'S  
ORDER (BY U. S. DISTRICT COURT).

To the Hon. EARL E. MOSS, Referee in Bankruptcy for the Southern District of California, Southern Division:

Elizabeth B. Russell, of Pasadena, in the County of Los Angeles, in said Southern District of California, Southern Division, respectfully represents to the Referee that on the 12th day of November, 1926, an order was made and entered herein, to which order reference is hereby made for further particulars, reading in part as follows:

“. . . NOW IT IS ORDERED that the said report of exemptions and the setting apart of the said property therein described to the bankrupt as exempt be and it hereby is approved so far as it relates to the following particular articles of property:



Wearing apparel .....	\$150.00
Pictures .....	50.00
2 Rings (pledged) .....	100.00
1 Watch .....	25.00
2 Pins .....	25.00

AND IT IS FURTHER ORDERED that the trustee's report refusing to set aside the following described property as exempt, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit: That portion of Lot 2, in Block 'Q' of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County, described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the map of the Oakwood Tract, recorded in Book 9, [18] Page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

is approved, and the Referee finds that the said property is worth approximately \$14,000.00 with

an encumbrance of approximately \$7,000.00; that the bankrupt is entitled to a claim of exemption by virtue of a declaration of homestead having been filed upon the said property to the extent of \$5,000.00; that the bankrupt estate is entitled to receive the difference between the total of the \$7,000.00 encumbrance plus interest and the \$5,000.00 claim of homestead and the value of the property; and in accordance with the opinion of the Referee of October 1, 1926, the trustee is ordered to bring proceedings to sell the said property free and clear of liens and from the proceeds pay the said encumbrance plus interest and the claim of homestead exemption of \$5,000.00 to the bankrupt, and account to the bankrupt estate for the surplus over and above the two said amounts.”

Attention is particularly directed to the fact that among other things said order approved the trustee's report refusing to set aside the real property above described as exempt although said property was the homestead of the bankrupt and her husband, Rufus W. Russell, by declaration of homestead duly claimed by the bankrupt, declared, recorded and filed long prior to the bankruptcy and exempt under the provisions of Section 1257 of the Civil Code of the State of California and Section 1240, Civil Code of the State of California.

The only right, title or interest of the bankrupt, Elizabeth B. Russell, in or to said real property which is the subject of the homestead, was the proceeds of the investment of \$2,000.00 therein by her, which investment was made on the [19] 22d day

of September, 1923. The bankrupt respectfully represents that no other sum of money and no other property of the bankrupt, Elizabeth B. Russell, was at any time thereafter invested in said property, but that such additional sums as were from time to time thereafter invested in said property were wholly community funds under the ownership and control of Rufus W. Russell, husband of the bankrupt, who is not in any manner whatsoever concerned in the bankruptcy or in the transactions out of which it arose. That all of the investment of community funds occurred long after the declaration of the homestead was recorded.

The bankrupt further respectfully represents that the total contributions of investment made in said homestead property from the funds of the community is \$5,000.00 and that the said homestead is subject to encumbrance, being the balance unpaid on contract of purchase due Hogan Company in the sum of \$7,000.00. That the said homestead property is not worth in excess of \$14,000.00. That the total value of the right, title and interest of the bankrupt in and to said homestead property is therefore less than \$5,000.00, to wit: is of the value of \$2,000.00 and no more, and the entire remaining interest therein is the community property of Rufus W. Russell.

Your petitioner respectfully urges that the Referee erred in so much of his order confirming the Trustee's report of exempt property as is embraced in the portion of said order confirming the refusal of the Trustee to set aside the above-de-

scribed real property as exempt property, and your petitioner cites this as an error and hereby asks for review of the Referee's order in reference to said refusal to set aside the said above-described real property as exempt property.

Your petitioner respectfully asks that the Referee forthwith certify to the Judges of the District Court of [20] United States, Southern District of California, the question presented by petitioner's petition in this respect, to wit: whether or not community funds procured by the bankrupt from the control of her husband and invested in property already exempt (which last-mentioned funds when added to the funds already invested therein by the bankrupt, exceed in amount the total homestead exemption of \$5,000.00) shall be deemed to create an excess interest in the bankrupt in the homestead property in excess of the interest permitted to be exempted under the law of the State of California and of the United States of America following thereon, regardless of the fact that the separate right, title and interest of the said bankrupt, Elizabeth B. Russell, was of a value of \$2,000.00 and less than the homestead exemption without said additions from the community source.

Notice of referee's order was received November 18, 1926.

Dated this 24th day of November, 1926.

ELIZABETH B. RUSSELL,

Petitioner.

MORIN, NEWELL & BROWN.

By J. W. MORIN,

Attorneys for Petitioner.

State of California,  
County of Los Angeles,—ss.

Elizabeth B. Russell, being duly sworn, deposes and says: That I have read the foregoing petition and know the contents thereof and all the matters and things therein stated are true to my own knowledge.

ELIZABETH B. RUSSELL.

Subscribed and sworn to before me this 24th day of November, 1926.

[Seal]            JAMES WHEELER MORIN,  
Notary Public in and for the County of Los Angeles, State of California. [21]

EXHIBIT "E."

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615—J.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

REFEREE'S CERTIFICATE ON PETITION  
FOR REVIEW.

To the Honorable, The Judges of the United States District Court, in and for the Southern District of California, Southern Division:

I, Earl E. Moss, Referee in Bankruptcy, to whom

the above-entitled proceedings were referred, do hereby certify:

That in the course of the proceedings an order was made and entered on the 12th day of November, 1926, as follows:

“In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615—J.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

REFEREE'S ORDER APPROVING TRUSTEE'S REPORT OF EXEMPT PROPERTY.

Upon the 11th day of September, 1926, the trustee's report of property set apart to the bankrupt as exempt was filed and presented for approval, and exceptions thereto having been filed upon behalf of the bankrupt by her counsel, J. W. Morin, and the Referee having set for hearing the said trustee's report and the exemptions therein on the 27th day of September, 1926, at which time hearing was had and an opinion rendered by the Referee on October 1st, 1926, confirming and approving the said report as filed.

NOW IT IS ORDERED that the said report of [22] exemptions and the setting apart of the said property therein described to the bankrupt as exempt be and it hereby is approved so far as it re-

lates to the following particular articles of property:

Wearing apparel.....	\$150.00
Pictures .....	50.00
2 Rings (pledged).....	100.00
1 Watch .....	25.00
2 Pins.....	25.00

AND IT IS FURTHER ORDERED that the trustee's report refusing to set aside the following described property as exempt, to wit:

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit: That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County, described as follows:

Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the map of the Oakwood Tract, recorded in Book 9, page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California.

is approved, and the Referee finds that the said property is worth approximately \$14,000.00 with an encumbrance of approximately \$7,000.00; that the bankrupt is entitled to a claim of exemption by virtue of a declaration of homestead having been filed upon the said property to the extent of \$5,000.00; that the bankrupt estate is entitled to receive the difference between the total of the \$7,000.00 encumbrance plus interest and the \$5,000.00 claim of homestead and the value of the property; and in accordance with the opinion of the Referee of October 1, [23] 1926, the trustee is ordered to bring proceedings to sell the said property free and clear of liens and from the proceeds pay the said encumbrance plus interest and the claim of homestead exemption of \$5,000.00 to the bankrupt, and account to the bankrupt estate for the surplus over and above the two said amounts.

Dated this 12th day of November, 1926.

EARL E. MOSS,  
Referee in Bankruptcy."

The question for determination is whether or not said order is a proper order. At the time the order was made I rendered an opinion, which is as follows:



“In the District Court of the United States, Southern District of California, Southern Division.

In the Matter of ELIZABETH R RUSSELL,  
Bankrupt.

OPINION.

Appearances:

J. W. MORIN, representing the Bankrupt;

HUBERT F. LAUGHARN, representing himself  
as Trustee.

The bankrupt has filed an exception to the return of the trustee refusing to set aside as exempt certain real property claimed as a homestead, such refusal being based upon the ground that the property is of the value of \$14,000.00, with a pre-homestead encumbrance of \$7,000.00, leaving a net value of \$7,000.00, being in excess of \$5,000.00, the maximum value of a homestead allowed the head of a family or his wife. [24]

On September 22, 1923, the bankrupt purchased upon contract certain real property for the purchase price of \$14,500.00, the contract for the purchase being in the usual form of conditional sale contract, upon which the bankrupt paid \$3,000.00 of her separate funds and \$4,500.00 of the funds of the community. No contention was expressed on the part of the husband or the bankrupt that the amount of the community funds, \$4,500.00, invested in this real property, was intended to be a gift to the bankrupt. In fact, these sums were applied by

her from earnings of a hotel being operated jointly by the bankrupt and her husband without any agreement as to the ownership in the property or effect upon the title. She contends now, however, that she is entitled to a homestead to the extent of her separate funds invested in the property, \$3,000.00, and the remainder of the homestead, or of the net value of the property, being community funds, is not liable for the debts incurred by the bankrupt (and sought to be discharged in this bankruptcy) which were the result of an enterprise in which she engaged alone, wherein the obligations were not contracted by the husband, and in which he was not engaged as a partner, associate or otherwise.

In *Swan vs. Walden*, 156 Cal. 195, the Court held that a wife might impress land held in joint tenancy by a husband and herself with a homestead, and said:

‘Here the wife seeks to impress the whole land with the homestead characteristic. This she may do as to her own interest, which is her separate property, and this she may do as to her husband’s interest, since she has the power to declare a homestead upon the husband’s separate property, though he has no such power over hers. The homestead thus attempted to be declared is upon land, all of which is susceptible at the instance of the wife of having the homestead characteristics impressed upon it.’

While the holding in this case is as tenants [25] in common rather than joint tenancy, the reasoning above set forth is such that it would seem to authorize the wife to impress with the homestead characteristic land owned by her as her separate property and by her husband and herself as community property.

Assuming, then, that such a homestead be valid as to the value allowed by law, can the wife, the bankrupt herein, elect to impress a homestead upon the land to the value of her separate estate, to wit, \$3,000.00 and \$2,000.00 of the community estate, leaving the \$2,000.00 excess in value over and above the maximum amount allowed by law, as the community property which cannot be applied to the satisfaction of the wife's debts? While I find no decisions exactly in point, that of the Supreme Court of California in Estate of Davidson, 159 Cal. 98, in theory supports my view. In that case the Court said:

“ ‘It will be observed that in this Swan case the court was dealing with a selected homestead, impressed by the wife upon land held in cotenancy solely by herself and husband, and her right to do so is sustained because, as she had a right to declare a homestead upon her separate property, and also upon the separate property of her husband, the effect of her declaration was to impress the entire land, and the *entire interests* therein held by them in joint tenancy, with the homestead characteristics; that within the spirit and intent of the

act of 1868 authorizing a homestead to be filed where a cotenant was in the exclusive occupation of the land of the cotenancy, Mrs. Walden has such exclusive possession for such purpose. It was her peculiar position under the homestead law which made it possible for her to impress the land in its entirety that took the homestead declared by her out of the general rule denying the right of a cotenant to create a valid homestead on cotenancy property. It is clearly pointed out in that opinion that, in the peculiar instance of the homestead there under consideration, as the entire interest in the tenancy was susceptible to the impress of homestead upon it by the wife, the reason supporting the general rule denying the right of the husband to declare a homestead upon land held in cotenancy by himself or wife or third parties did not apply.

Here, however, an entirely different question is presented. We are not dealing with a selected homestead which the Court is asked to set apart to the surviving wife. What was sought in the matter at bar in the Superior Court, was to have that court select, designate, and set apart as a probate homestead, not the land of [26] the cotenancy in its entirety, but the undivided interest of the deceased cotenant therein. If the Superior Court could do this, it could only do it because in the lifetime of the decedent either he or his wife could have impressed a homestead on this particular coten-

ancy interest alone. Neither of the spouses, however, could do this. The husband under no circumstances could declare a homestead which would embrace, with his own interest, that of his wife in the cotenancy property, because he is prohibited under the homestead law from declaring a homestead on the separate property of his wife unless with her consent manifested by making or joining in the making of the declaration. Such a general declaration, as it would embrace the whole of the land and the *entire interest* in the cotenancy, would not be affected by the general rule. But neither the husband nor the wife jointly or severally could in the lifetime of the husband have made a valid declaration of homestead upon his undivided interest in the cotenancy property, so as to affect that interest alone with the homestead characteristics, separate and distinct from the undivided interest of the wife therein.'

In the above quotation the Court was discussing the decision in *Swan vs. Walden*, 156 Cal. 195. The use of the words 'entire interests' will be observed. While it is the bankrupt's contention that the effect of her declaration of homestead was to impress a homestead upon the portion of the land belonging to her as her separate property and part of the land owned by the community with such characteristic, yet the declaration itself does not attempt to so divide the interests, for which reason I am of the opinion that the declaration of homestead is not void, but valid only in the amount allowed by law.

There is but one homestead allowed to husband or wife or both, and neither of the spouses can so divide the interests as to place beyond the reach of creditors, by claim of ownership in the other non-bankrupt spouse, the excess in value over the amount of a homestead allowed by law. For these reasons the bankrupt is not entitled to have the property set aside as exempt. Upon proceedings to sell free and clear of liens, the amount of the homestead [27] exemption, \$5,000.00, may be set aside, and ordered paid to the persons entitled thereto by law in proper proportions, and the sum remaining to the trustee for disbursement in the administration of this estate.

Dated October 1, 1926.

EARL E. MOSS,

Referee in Bankruptcy."

The turning point in this matter, it seems to me, is the fact that the bankrupt attempts to homestead a divided interest, and under the decision in *Estate of Davidson*, 159 Cal. 1908, such a declaration of homestead is not authorized by the laws of California.

That on the 26th day of November, 1926, Elizabeth B. Russell, by her attorneys, Messrs. Morin, Newell & Brown, filed a Petition for Review, which was granted and which Petition for Review is hereto attached.

The Referee is transmitting with this Certificate for Review transcripts of the testimony and proceedings had before him at the time of the hearing of said matter.

I hand up herewith for the information of the judges, the following papers:

1. Petition for Review of Referee's Order—dated November 24th, 1926.
2. Trustee's Report of Exempt Property—filed September 11th, 1926.
3. Stipulation—filed September 23d, 1926.
4. Affidavit of mailing of Exceptions and Objections to Trustee's Report of Exempt Property—filed September 27th, 1926.
5. Bankrupt's Exhibits Nos. "A," "B," "C," "D," "E," "F," and "G"; Trustee's Exhibits Nos. 1 and 2—filed September 27th, 1926.
6. Appointment, Oath and Report of Appraisers—filed December 7th, 1926. [28]
7. Reporter's transcript of testimony—filed December 7th, 1926.
8. Notice of Entry of Judgment—filed November 17th, 1926.

Dated: December 13th, 1926.

EARL E. MOSS,  
Referee in Bankruptcy. [29]

## EXHIBIT "F."

At a stated term, to wit: The January term, A. D. 1927, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the courtroom thereof, in the city of Los Angeles, on Saturday, the 29th day of January, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable WM. P. JAMES, District Judge.

No. 8615-J.—BKCY.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

MINUTES OF COURT—JANUARY 29, 1927—  
ORDER CONFIRMING ORDER OF REF-  
EREE.

The order of the Referee of the 12th day of November, 1926, brought here for review by Elizabeth B. Russell, the bankrupt, having been examined and fully considered with the argument of counsel; said order is confirmed and approved. An exception is allowed the bankrupt to the making of this order. [30]



EXHIBIT "G."

222.

APPOINTMENT, OATH, AND REPORT OF  
APPRAISERS.

(Form No. 13.)

In the District Court of the United States, South-  
ern District of California.

IN BANKRUPTCY—No. 8615—J.

IN the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

IT IS ORDERED, that Thurmond Clarke, of  
———, E. A. Lynch, of ——, and F. E. Fensch,  
of ——, three disinterested persons, be, and they  
are hereby, appointed appraisers to appraise the  
real and personal property belonging to the estate  
of the said bankrupt set out in the schedules now on  
file in this court, at a compensation not exceeding  
\$10 per day each, and report their appraisal to the  
Court, said appraisal to be made as soon as may be,  
and the appraisers to be duly sworn.

WITNESS my hand this 12th day of November,  
A. D. 1926.

EARL E. MOSS,  
Referee in Bankruptcy.

Southern District of California,—ss.

Personally appeared the within named \_\_\_\_\_

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and severally made oath that they will fully and fairly appraise the aforesaid real and personal property according to their best skill and judgment.

E. A. LYNCH.

F. A. FENSCH.

THURMAN CLARKE. [31]

Subscribed and sworn to before me this 4 day of Dec. 1926.

[Seal]

LOUISE HUDSON,

Notary Public in and for the County of Los Angeles, State of California.

WE, THE UNDERSIGNED, having been notified that we were appointed to estimate and appraise the real and personal property aforesaid, have attended to the duties assigned us, and after a strict examination and careful inquiry, we do estimate and appraise the same as follows:

Dollars Cents

Property lying and being in the County of Los Angeles, State of California, and bounded and particularly described as follows, to wit: That portion of Lot 2, in Block "Q" of the San Pasqual Tract, Book 3, Page 315, Miscellaneous Records of said County,

described as follows: Beginning at a point in the East line of Hudson Avenue, distant 70 feet South from the Southeast corner of California Street and Hudson Avenue, as said corner is shown on the map of the Oakwood Tract, recorded in Book 9, Page 33 of Maps, thence East parallel with the South line of said California Street, one hundred and twenty-five (125) feet, then South parallel with the East line of Hudson Avenue, 60 feet thence West parallel with the South line of said California Street, 125 feet to the East line of said Hudson Avenue, thence North along said East line 60 feet to the point of beginning. Also known as No. 590 S. Hudson Avenue, in the City of Pasadena, California. Said property is encumbered to the extent of approximately \$7,000.00 in favor of Hogan Finance Company and the bankrupt claims a \$5,000.00 exemption on the property.

Total Value . . . . . 14,500.00

IN WITNESS WHEREOF, we hereunto set out hands, at Los Angeles, this 4th day of Dec., A. D. 1926.

E. A. LYNCH,  
Appraiser.

F. E. FENSCH,  
Appraiser.

THURMAN CLARKE,  
Appraiser.

[Endorsed]: Filed Dec. 7, 1926, at — min. past 4 o'clock P. M. Earl E. Moss, Referee. Louise Hudson, Clerk. [33]

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In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 8615-J.

In the Matter of ELIZABETH B. RUSSELL,  
Bankrupt.

STIPULATION AS TO CERTAIN FACTS.

IT IS HEREBY STIPULATED by and between Herbert F. Laughran, Trustee, and Messrs. Morin, Newell & Brosn, attorneys for bankrupt, that the declaration of homestead filed by Elizabeth B. Russell and recorded October 11th, 1923, in Book 2718, at Page 247 of Official Records, Los Angeles County, California, was declared and recorded after Elizabeth B. Russell had invested in the property described therein the total amount of

Three Thousand Dollars (\$3,000.00), of which Two Thousand Dollars (\$2,000.00) were her separate funds and One Thousand Dollars (\$1,000.00) was money borrowed by her without security, and that no other sums were invested therein until a date long subsequent thereto and on or after February, 1924, when additional sums were invested from time to time thereafter totaling Forty-five Hundred Dollars (\$4500.00), all of which were community funds derived from the Crown Hotel, community property of the bankrupt and Rufus W. Russell, her husband.

Dated this 21 day of February, 1927.

HUBERT F. LAUGHARN,  
Trustee.

MORIN, NEWELL & BROWN,  
By J. W. MORIN,  
Attorneys for Bankrupt. [34]

[Endorsed]: Filed Feb. 28, 1927, at — min.  
past 2 o'clock P. M. [35]

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[Title of Court and Cause.]

AFFIDAVIT OF SERVICE OF PETITION TO  
REVISE.

State of California,  
County of Los Angeles,—ss.

J. W. Morin, being first duly sworn, on oath deposes and says:

That on the 28th day of February, 1927, I did serve a true and correct copy of the Petition to Re-

wise filed herein on February 28th, 1927, upon Herbert F. Laugharn, Trustee of said Bankrupt, by leaving the same in his office, Room 615, Subway-Terminal Building, Los Angeles, California, in charge of his employee, to wit, his stenographer, he being at the time absent from said office.

Dated this 4th day of March, 1927.

J. W. MORIN.

Subscribed and sworn to before me this 4th day of March, 1927.

[Seal]

STANLEY K. BROWN,

Notary Public in and for the County of Los Angeles, State of California. [36]

Filed Mar. 7, 1927 at 15 min. past 2 o'clock P. M.

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[Title of Court and Cause.]

STIPULATION AS TO RECORD AND FACTS.

It is hereby stipulated by and between Herbert F. Laugharn, Trustee of the Estate of Elizabeth B. Russell, a bankrupt, respondent herein, and Elizabeth B. Russell, claimant and petitioner herein, that the record of proceedings attached to the Petition for Revision in the above-entitled matter is a fully, true and correct copy of the proceedings in the District Court of the United States in and for the Southern District of California, Southern Division, concerning the Trustee's Report of Exempt Property, the Exceptions and Objections to Trustee's Report of Exempt Property filed herein by Elizabeth B. Russell, bankrupt, and the

proceedings thereunder had before the referee and before the United States District Court herein referred to; that the summary of the evidence contained in the Referee's Certificate on Petition for Review attached to the said Petition for Revision, and marked Exhibit "E," together with the stipulation as to Certain Facts dated the 21st day of February, 1927, between Herbert F. Laugharn, as Trustee, and Morin, Newell & Brown, as counsel for the Bankrupt, constitute a full, true and correct statement of the facts relating to said claim as the same were presented before the said Referee and before the said United States District Court above mentioned; that the said matter may be heard, considered and determined by the United States Circuit Court of Appeals on said record. [37]

Dated this 28 day of February, 1927.

HUBERT F. LAUGHARN,

Trustee.

MORIN, NEWELL & BROWN.

By J. W. MORIN. [38]

[Endorsed]: Filed Mar. 7, 1927, at 15 min. past 2 o'clock P. M. [39]

[Title of Court and Cause.]

ORDER (OF UNITED STATES DISTRICT COURT) ALLOWING PETITION FOR REVISION AND THAT CLERK PREPARE RECORD.

WHEREAS, Elizabeth B. Russell, Bankrupt, feels aggrieved by order entered herein on the 29th day of January, 1927, and the Court being satisfied that the questions therein determined are questions of which revision may be asked, as provided in Sections 24 & 25 of the Bankrupt Act of 1898, and that the application should be granted, on motion of Messrs. Morin, Newell & Brown, attorneys for said Bankrupt,—

IT IS ORDERED that the order of this Court made and entered herein on the 29th day of January, 1927, confirming the order of Earl E. Moss, Referee in Bankruptcy, which approves the Report of the Referee in so far as it refuses to set aside certain therein described property as exempt property, be revised in matters of law by the United States Circuit Court of Appeals in and for the Ninth District, as provided by Section 24-B of the Bankrupt Act of 1898, and the rules and practice of that Court; and that the Clerk of this court prepare at the expense of Petitioner a certified copy of such order and a record of this case as provided in said Petition, and in conformity with the Stipulations of the Trustee and counsel for the Bankrupt.



Dated this 28th day of February, 1927.

WM. P. JAMES,  
United States District Judge. [40]

[Endorsed]: Filed Feb. 28, 1927, at 45 min. past  
2 o'clock P. M. [41]

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[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON PETI-  
TION FOR REVISION.

To the Clerk of Said Court:

Sir: Please issue certified copy of the following portions of the record in the above matter for use in the support of the Petition to Revise, filed February 28, 1927, to wit:

1. Trustee's Report of Exempt Property.
2. Exceptions and Objections to Trustee's Report of Exempt Property.
3. Notice of Entry of Judgment (By Referee).
4. Petition for Review of Referee's Order (By United States District Court).
5. Referee's Certificate on Petition for Review.
6. Order of the United States District Court Confirming Order Approving Referee's Order.
7. Appraisement.
8. Affidavit of Service of Petition to Revise.
9. Stipulation as to Record and Facts.

10. Order (of United States District Court) Allowing Petition for Revision and that Clerk Prepare Record.

MORIN, NEWELL & BROWN.

By J. W. MORIN,  
Attorneys for Bankrupt.

[Endorsed]: Filed Mar. 4, 1927, at 40 min. past 4 o'clock P. M. [42]

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[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TRANSCRIPT ON PETITION  
FOR REVISION.

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 42 pages, numbered from 1 to 42 inclusive, to be the transcript on **Petition for Revision in the** above-entitled cause, and contains a full, true and correct copy of the following:

Petition for Revision,—which contains exhibits lettered from “A” to “G,” inclusive, being copies of the following:

Trustee’s Report of Exempt Property,  
Exceptions and Objections to Trustee’s Report of Exempt Property,  
Notice of Entry of Judgment (By Referee),  
Petition for Review of Referee’s Order (By United States District Court),  
Referee’s Certificate on Petition for Review,

Order of the United States District Court Confirming Order Approving Referee's Order, and

Appraisement,

and Affidavit of Service of Petition to Revise,

Stipulation as to Record and Facts,

Order (of United States District Court) Allowing

Petition for Revision and That Clerk Prepare

Record, and

Praecipe

I DO FURTHER CERTIFY that the fees of the Clerk for preparing and certifying the foregoing Record on Petition for Revision amount to \$7.00, and that said amount has been paid me by the petitioner herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 10th day of March, in the year of our Lord one thousand nine hundred and twenty-seven, and of our Independence the one hundred and fifty-first.

[Seal]

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

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[Endorsed]: No. 5097. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth B. Russell, Bankrupt, Petitioner, vs. Hubert F.

Laugharn, as Trustee in Bankruptcy of the Estate of Elizabeth B. Russell, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the Southern Division of the United States District Court for the Southern District of California, Southern Division.

Filed March 14, 1927.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 5097.

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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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Elizabeth B. Russell, Bankrupt,  
*Petitioner,*

*vs.*

Hubert F. Laugharn, as Trustee in  
Banruptcy of the Estate of Eliza-  
beth B. Russell, Bankrupt,  
*Respondent.*

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BRIEF OF PLAINTIFF IN ERROR.

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MORIN, NEWELL & BROWN,

By J. W. MORIN,

*Attorneys for Elizabeth B. Russell, Plaintiff in Error.*

723 Pacific Southwest Bank Building, Pasadena, Calif.

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FILED

Parker, Stone & Baird Co., Law Printers, Los Angeles.

APR 13 1927

E. D. MONTGOMERY



No. 5097.

IN THE

United States

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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Elizabeth B. Russell, Bankrupt,  
*Petitioner,*

*vs.*

Hubert F. Laugharn, as Trustee in  
Banruptcy of the Estate of Eliza-  
beth B. Russell, Bankrupt,  
*Respondent.*

---

BRIEF OF PLAINTIFF IN ERROR.

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## STATEMENT OF FACTS.

Elizabeth B. Russell, who is the bankrupt herein, on September 22, 1923, entered into an agreement in writing for the purchase under contract of the real property involved herein from the Hogan Company, as contract sellers. On that date \$2,000.00 was paid out of her separate funds, and a day or so later \$1,000.00 additional money borrowed from a friend, a Mrs. Hartman, without security, was also paid, making up the total initial payment of \$3,000.00, provided for under the terms of

the contract. Thereupon a contract was delivered to her, and she entered into the possession of the property with her husband and daughter at that time.

Thereafter, on the 11th day of October, 1923, Mrs. Russell filed the Declaration of Homestead upon the property as the wife of the head of the family. This homestead is conceded to be regular in all respects. No additional payments were made upon the purchase price of the property until in February, 1924, when an additional payment was made derived from funds of the Crown Hotel. This hotel was an enterprise which had been for some years past and was being operated by Mr. and Mrs. Russell in a down town section of Pasadena, and was concededly a community enterprise. Mrs. Russell, having the problem of making additional payments upon the property she had purchased, used her agency authority on the Crown Hotel bank account, and from time to time prior to her bankruptcy, which occurred in June, 1926, made additional payments on this purchase contract out of Crown Hotel funds, aggregating \$4,500.00. The agreed total purchase price of the homestead property was \$14,500.00, and at the time of the bankruptcy a total not to exceed \$2,000.00, or at the utmost \$3,000.00, had been paid from her separate funds, and \$4,500.00 from funds withdrawn from community funds. It will be noted that at the time of the Declaration of Homestead on October 11, 1923, no community funds had been involved in the homestead property, excepting perhaps the \$1,000.00 borrowed by her without security. There was no intention or act between Mr. and Mrs. Russell amounting to a gift of the Crown Hotel funds to Mrs. Russell, nor any act or intent to make a loan from the community



to Mrs. Russell. The bankrupt's debts were all contracted since her marriage. They had been married twenty-seven years.

In the course of the bankruptcy proceedings an appraisal was filed showing the homestead property to be of the value of \$14,500.00 altogether, being the identical value at which it had been agreed to be purchased. Thus there had been no increase of the value of Mrs. Russell's investment therein since filing the declaration. In the course of the bankruptcy proceedings, the trustee set aside the exempt property by his report of exemptions, but in said report refused to set aside the homestead property as exempt, and recommended that an order be made by the Referee permitting the property to be sold free and clear of liens, and the Referee thereupon, after due hearing, confirmed the report of the said Referee and ordered that the homestead property be sold, and the sum of merely \$5,000.00, statutory homestead exemption, set aside (which must be pro-rated between Mr. and Mrs. Russell as best they could), and all the balance of the proceeds devoted to the payment of the Hogan Company's balance of sale price, and the residue paid to the estate in bankruptcy. A petition for writ of review was granted by the Referee, and the question presented to the United States District Court, of the Southern District of California.

The question presented is this:

“Do community funds under the control of the husband in California lose their character as such, and become identified with the wife's separate property by the mere application of said community funds towards part payment of the homestead property,

where the Declaration of Homestead was filed at a prior date, without any feature of gift from the husband to the wife, or of loan of the funds from the husband to the wife, but where the application is merely made by the wife by virtue of an agency enjoyed by her in the community bank account.”

Specification of errors relied on is involved in the order of the United States District Court confirming the Referee’s Order involving the following points of error, to-wit:

1. Refusing to set aside as exempt the homestead property of the bankrupt described as follows:

“Property lying and being in the county of Los Angeles, state of California, and bounded and particularly described as follows:

That portion of lot 2 in block ‘Q’ of the San Pasqual Tract, book 3, page 315, miscellaneous records of said county, described as follows:

Beginning at a point in the east line of Hudson avenue, distant 70 feet south from the southeast corner of California street and Hudson avenue, as said corner is shown on the map of the Oakwood Tract, recorded in book 9, page 33 of maps, thence east parallel with the south line of California street, one hundred twenty-five (125) feet, thence south parallel with the east line of Hudson avenue 60 feet, thence west parallel with the south line of said California street, 125 feet to the east line of Hudson avenue, thence north along said east line 60 feet to the point of beginning. Also known as 590 S. Hudson avenue, in the city of Pasadena, California.”

2. Ordering the trustee in bankruptcy to bring proceedings to sell the homestead, being exempt property, though of a value less than \$5000.00, the amount of the exemption, and to account to the estate in bankruptcy for

all proceeds in excess of the encumbrances with interest and the \$5000.00 exemption, thus converting the community property to the use of the wife's estate in bankruptcy.

3. Pooling the \$5000.00 exemption over both the separate estate of the bankrupt wife and also the community interest of the husband, in the homesteaded property, though the community interest was added to the investment after the declaration of homestead, and ignoring the fact of the community (husband's) undivided interest in the property as distinct from the wife.

4. Denying the bankrupt a full exemption of \$5000.00 in the homestead property belonging to her of value as established by the record not in excess of \$5000.00.

5. Converting the community property of the husband into the separate property of the wife without gift, descent, devise or loan from husband to the wife.

6. Subjecting community property of the husband to the debts of the wife without the appropriation thereto by the husband.

7. Altering the estate in the property as between the wife's separate interest and the community as tenant in common into the separate property of the wife.

The order of the referee confirming the report of the trustee in bankruptcy refusing to set aside the exempt homestead and ordering a sale thereof, of the homestead interest of the wife, being of a value less than \$5000.00, was excepted to by the bankrupt, who filed on November 26, 1926, her petition for writ of review of said referee's order in the United States District Court, which petition was granted, but thereafter in pursuance to the review of

said order the same was on January 29, 1927, confirmed and approved by said United States District Court and an exception thereto allowed.

### California State Statutes Referred to.

Sections of Civil Code:

161. A husband and wife may hold property as joint tenants, tenants in common or as community property.

162. All property of the wife \* \* \* acquired after marriage by gift, bequest, devise or descent \* \* \* is her separate property. \* \* \*

164. All other property acquired after marriage by either husband or wife or both \* \* \* is community property. \* \* \*

167. The property of the community is not liable for the contracts of the wife made after marriage. \* \* \*

172. The husband has the management and control of the community personal property. \* \* \*

172a. The husband has the management and control of the community real property but the wife must join in deed. \* \* \*

1240. The homestead is exempt from execution or forced sale.

1243. The homestead can be abandoned only by a declaration. \* \* \*

1254. If \* \* \* the land exceeds in value the amount of the homestead exemption \* \* \* he (the court) must make an order directing the sale. \* \* \*

1256. If the sale is made the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant. \* \* \*

Section 1474, Code of Civil Procedure, provides in substance that the title to the homestead descends to the heirs and devisees of the owner of the title thereto, underlying the homestead claim, where the homestead was selected on decedent's separate property without consent.

Section 853, Civil Code: Where a transfer of real property is made to one person and the consideration paid by another a trust is presumed to result in favor by or for whom such payment was made.

### **Points of Argument.**

The bankrupt's interest in the property was of value not in excess of \$2000.00 at time of recording declaration of homestead (see STIPULATION AS TO CERTAIN FACTS between attorneys for bankrupt and the trustee printed on pp. 42 and 43 of Petition for Revision), and by this stipulation it appears that all subsequent accretions to the investment were subsequent to the declaration of homestead and from community funds.

Money borrowed by a spouse without security on separate property is community money.

Schuyler v. Broughton, 70 Cal. 282.

There was no increase in the value of the property and hence no excess created over the exemption limit. (Report of Appraisers, Petition p. 41; Referee's Order, Petition p. 30.)

The status of property as to its separate or community character is determined by the mode of acquisition.

Potter v. Smith, 48 Cal. App. 162.

When property is acquired in part by the use of community funds and in part by the use of separate funds the

interests therein will be prorated between the separate and community estates in the proportion of said respective funds.

Schuyler v. Broughton, 70 Cal. 282.

There was no gift and no loan of funds from husband to wife involved in this Russell case. (See Referee's Opinion, Petition printed pp. 31 and 32. Also STIPULATION between trustee and attorneys for bankrupt, pp. 42 and 43 of printed Petition.)

Community funds create a community interest in property so acquired and are held in trust by the spouse so acquiring, for the community.

25 Cal. Juris. 194;

Shanan v. Crampton, 92 Cal. 9;

Osborn v. Mills, 20 Cal. App. 346.

And this last authority is to the effect that taking in the wife's name does not affect this trusteeship for the community.

The mere possession or actual management by one of the spouses does not affect the title of the community nor show an intention of the other spouse to make a gift.

Shaw v. Burnell, 163 Cal. 262;

Varni v. DeVoto, 10 Cal. App. 304.

Husband and wife may have an interest as tenants in common in property of a homestead character.

*In re* Bailard, 178 Cal. 293.

If the foregoing proposition is sound, much less does a husband forfeit community property to creditors of the wife because of the mere fact that the wife has drawn money out of the community bank account on her agency

signature and made payments on property of hers already homesteaded.

The declaration of homestead does not affect the real or underlying title to the property itself as it stood before the declaration but merely, while it continues unabandoned, gives the property certain characteristics or incidents—principally two—inviolability to creditors' claims and succession to survivor under certain conditions on the death of one spouse.

Burkett v. Burkett, 78 Cal. 310;  
Sec. 1474, Code of Civil Procedure.

If a homestead was synonymous with title then why should the court distribute a homestead out of separate property of decedent under certain circumstances still to the heirs and devisees of the decedent subject only to a limited use to the survivor unless the underlying title was still in the decedent, and if a homestead is abandoned by declaration it resumes its former ownership as to title free of restriction.

The foregoing considerations are urged for the particular purpose of making the point that by the two sources of investment the Russell homestead property as to title was tenancy in common and is still and would have been even though the declaration had followed the completion of all investments therein—that the title which the trustee proposed to sell and divest is the undivided property of both spouses, and the husband regardless of a forced sale in the bankruptcy proceedings will retain his undivided interest in the proceeds prorata and that his prorata of the equity in the property over the amount still due the contract seller will reduce the proceeds remaining to the bankrupt to

\$2000.00—that nothing can go to the creditors in such a proceeding by any possibility, and the sale is therefore entirely improper and the order of the referee requiring the sale should be reversed and the order of the referee on confirmation of trustee's report of exempt property should be modified to require the trustee to set apart the entire real property described in the homestead as exempt property and to remove it from the effect of the bankruptcy proceedings.

Respectfully submitted,  
MORIN, NEWELL & BROWN,  
By J. W. MORIN,  
*Attorneys for Petitioner Bankrupt.*



No. 5098

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JOHN P. CARTER, formerly United States Collector of  
Internal Revenue, Sixth District of California,  
Plaintiff in Error,

vs.

JACOB BAUMAN,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District  
Court, for the Southern District of Cal-  
ifornia, Southern Division.

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FILED

MAR 14 1927

F. D. MONCKTON,  
CLERK



No.

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**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JOHN P. CARTER, formerly United States Collector of  
Internal Revenue, Sixth District of California,  
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Upon Writ of Error to the United States District  
Court, for the Southern District of Cal-  
ifornia, Southern Division.

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## INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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### **Names and Addresses of Attorneys.**

Attorneys for Plaintiff in Error:

S. W. McNABB, Esq., United States Attorney;  
DONALD ARMSTRONG, Esq., Assistant  
United States Attorney, Federal Building, Los  
Angeles, California.

Attorney for Defendant in Error:

DANIEL J. CHAPIN, Esq., I. W. Hellman Build-  
ing, Los Angeles, California.

United States of America, ss.

To JACOB BAUMAN, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15th day of December, A. D. 1926, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause wherein you are defendant in error and John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, is plaintiff in error and you are hereby required to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable PAUL J. McCORMICK United States District Judge for the Southern District of California, this 16 day of November, A. D. 1926, and of the Independence of the United States, the one hundred and fifty-first.

Paul J McCormick

U. S. District Judge for the Southern District of California.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit John P. Carter, former Collector of Internal Revenue for the Sixth District of California, Plaintiff in Error, vs. Jacob Bauman Defendant in Error. Due service of the within citation



acknowledged this 23<sup>th</sup> day of November, A. D. 1926. Dan J. Chapin attorney for plaintiff. Citation Filed Nov. 23, 1926. R. S. Zimmerman, clerk, by L. J. Cordes, deputy clerk.

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United States of America, ss.

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The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California,

GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between Jacob Bauman, plaintiff, against John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, Defendant a manifest error hath happened, to the great damage of the said John P. Carter, defendant as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 15<sup>th</sup> day of December next, in the said United States Circuit Court of Appeals, to be there and then held, that the

record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 15th day of November in the year of our Lord one thousand nine hundred and twenty-six and of the Independence of the United States the one hundred and fifty-first

[Seal]

Chas. N. Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

Paul J. McCormick

Judge.

I hereby certify that a copy of the within Writ of Error was on the 23 day of November, 1926, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

R. S. Zimmerman

Clerk of the District Court of the United States for the Southern District of California.

[Endorsed]: 1804 Civ. United States Circuit Court of Appeals for the Ninth Circuit John P. Carter Plaintiff in Error vs. Jacob Bauman Defendant in Error

Writ of Error Filed Nov. 16, 1926 R. S. Zimmerman, clerk; Murray R. Wire, deputy.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN JUDICIAL DISTRICT OF CALIFORNIA.

JACOB BAUMAN, Plaintiff, )
vs. ) AT LAW
JOHN P. CARTER, Former Collector )
of Internal Revenue for the Sixth )
District of California, )
Defendant. )

Comes now Jacob Bauman, the plaintiff above named, and for cause of action against the above named defendant says:

(1) That on and prior and subsequent to April 26, 1921, he was a citizen and resident of the City of Los Angeles, County of Los Angeles, State of California, residing at 947 Arapahoe Street, and was the proprietor and duly qualified wine maker of bonded winery No. 5 located at Lankershim, said county and state.

(2) That the defendant, John P. Carter, was prior to March 6, 1922, the duly appointed and acting Collector of Internal Revenue for the United States for the Sixth District of California, and was such Collector for more than four years prior thereto.

(3) That he, the plaintiff herein, during the wine season of 1920 leased said bonded winery No. 5, located at Lankershim, California, from the then proprietors, Borgia Brothers; that he thereupon qualified as the pro-

prietor and wine maker of said winery by giving the bond required under the law and regulations, and by meeting the other requirements therein provided; that among other requirements he filed with the defendant herein a plan of the winery premises, and that said plan showed a room designated as a fortifying room, which under the law and regulations was to be constructed as therein provided and was part and parcel of the bonded premises; that said room was constructed by said plaintiff and his lessors, and was thereafter examined by said defendant Carter, or his representative, and was approved by said defendant as in all respects conforming to the law and regulations; and said bond was acquired and filed and likewise approved by said defendant, the said Collector of Internal Revenue.

(4) That on or about November 14, 1920, there was stored in said fortifying room on the bonded premises of winery No. 5, nine barrels of distilled spirits designated under the name of "Grape Brandy", and containing 820.9 taxable gallons on which the Internal Revenue tax had not been paid; that this brandy had been stored in said fortifying room under the direct supervision of said Collector John P. Carter, through his duly appointed representative; and said brandy was to be used by the plaintiff herein in the fortification of pure sweet wines.

(5) That in accordance with the law and regulations governing the construction of fortifying rooms on bonded winery premises, the entrance door to aforesaid room was provided with a Government lock and seal, the key to which was at all times in the possession of

the defendant herein, or his duly appointed representative; that when the said nine barrels of brandy were deposited in said room, the entrance door was secured by defendant's representative with said lock and seal and the key to the lock was kept in his possession; and that plaintiff had no ingress to said room except by the permission and at the sufferance of said defendant or his representative.

(6) That before said brandy was used, and on or about November 15, 1920, said nine barrels of brandy were stolen from said room by parties unknown to the plaintiff and without any negligence, connivance, collusion, or fraud on his part.

(7) That this stolen brandy was not recovered and was a total loss to the plaintiff, and he has received no recompence for either the whole or a part of it.

(8) That under the provisions of Section 5, Act of November 23, 1921, (42 Stat., 222) no tax is assessable or collectible on distilled spirits lost by theft from a distillery warehouse or other bonded warehouse in the absence of fraud on part of the owner.

(9) That Sections 3221 and 3223 (20 Stat., 327) and Section 5, Act of June 7, 1906 (34 Stat., 215), extending the provisions of said sections as amended to grape brandy stored in fortifying rooms on bonded winery premises, were in effect November 14, 1920, and are now in effect and force.

(10) That the fortifying room on the aforesaid bonded winery premises was constructed and supervised in conformity with the law and regulations regarding construction and supervision of distillery warehouses

and other bonded warehouses; and it is the plaintiff's and my contention that said fortifying room was on November 15, 1920, a bonded warehouse under the provision of the law and regulations regarding bonded warehouses; and by virtue of the aforesaid acts, that any distilled spirits stored therein for fortifying purposes and lost by theft before being used for such purposes, are not subject to any unpaid internal revenue taxes, except where fraud can be shown on the part of the owner.

(11) That notwithstanding the fact that a fortifying room on the premises of a bonded winery is a bonded warehouse and taxes are not assessable or collectible on spirits contained therein lost by theft without fraud or recovery by the owner while in the custody of a revenue officer, the said John P. Carter, then Collector of Internal Revenue for the Sixth District of California, wrongfully and illegally exacted and collected from the plaintiff herein under color of the provisions of Section 600, Act approved February 24, 1919, (40 Stat., 1057) entitled "An Act to Provide Revenue and for Other Purposes", and demanded and required that the plaintiff involuntarily and under duress and compulsion pay to him on April 26, 1921, the sum of \$1,805.98, taxes due on 820.9 proof gallons of brandy at the rate of \$2.20 per gallon.

(12) That at said time and place the plaintiff served oral notice upon the defendant, John P. Carter, that said payment was made under duress and compulsion, and under protest solely for the purpose of avoiding the imposed penalties in said Act provided, and the restraint

of his goods, chattels and effects, reserving all his rights to recover said amount so illegally and erroneously assessed and collected; and that the assessment of said tax was illegal and void as against said plaintiff.

(13) That thereafter on or about April 28, 1921, the plaintiff presented and delivered to said John P. Carter a claim for refund of \$1,313.08, a portion of the \$1,805.98 taxes paid to him, for transmission to the Commissioner of Internal Revenue at Washington, D. C., which application was in conformity with the law and regulations governing such matters; that thereafter on or about July 6, 1923, the said Commissioner of Internal Revenue notified the said plaintiff that his claim had been disallowed and rejected on the grounds that the relief provisions of Section 5, Act of November 23, 1921 for losses of distilled spirits by theft from distillery bonded warehouses or other bonded warehouses was not applicable to losses of brandy by theft from the fortifying room on the premises of a bonded winery.

(14) That thereafter on or about July 18, 1923, the plaintiff presented and delivered to the Collector of Internal Revenue for the Sixth District of California, an amended claim for refund to be transmitted to the said Commissioner of Internal Revenue at Washington, in the full amount of the taxes paid (\$1,805.98) on the said nine barrels of distilled spirits stolen from said fortifying room; and that subsequent thereto, on or about June 12, 1924, said Commissioner notified the plaintiff that his amended claim and application for refund of the full amount of taxes so paid had been disallowed and rejected on the grounds aforesaid; and

said defendant, John P. Carter, as Collector of Internal Revenue, to whom said money was paid, by reason of the rejection and disallowance of said appeals and applications for refund by the Commissioner of Internal Revenue, refused and still refuses to refund to the plaintiff herein the whole or any part of said taxes so wrongfully and illegally exacted and collected from him.

WHEREFORE, the plaintiff herein demands judgment against the defendant for the sum of \$1,805.98, together with interest thereon from April 26, 1921, and for costs and disbursements herein.

Daniel J. Chapin

Attorney for Plaintiff.

STATE OF CALIFORNIA )  
 ) ss.  
 CITY AND COUNTY OF LOS ANGELES, )

JACOB BAUMAN, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action and has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters, he believes it to be true.

Jacob Bauman

Subscribed and sworn to before me this 1st day of August, 1924.

[Seal]

Fannie D. Medlar

Notary Public in and for the City and County of  
 Los Angeles, State of California

My Commission Expires Oct. 29, 1924.



[Endorsed]: In law. No. 1804-M. In the District Court of the United States, in and for the Southern District of California Southern *District*. Jacob Bauman plaintiff, v. John P. Carter, Former Collector of Internal Revenue for the Sixth District of California, defendant. Bill of Complaint. Filed Aug. 2, 1924. Chas. N. Williams, clerk, by Edmund L. Smith, deputy clerk. Daniel J. Chapin, Attorney 301 I. W. Hellman Bldg.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN JUDICIAL DISTRICT OF CALIFORNIA.

JACOB BAUMAN, Plaintiff,	)	
	)	
vs.	)	
	)	
JOHN P. CARTER, Former Collector	)	AT LAW
of Internal Revenue for the Sixth	)	
District of California,	)	
Defendant	)	
	)	

It is stipulated between Samuel W. McNabb, United States District Attorney and Assistant United States Attorney, Donald Armstrong, for said Southern District of California, attorneys for the Defendant, and Dan J. Chapin, Attorney for the Plaintiff:

First That John P. Carter, defendant herein, was the Collector of Internal Revenue for the Sixth District of California on November 15, 1920, and was such collector until March 6, 1922, and was such collector for more than four years prior thereto;

Second That Jacob Bauman, the plaintiff herein, was the proprietor of Bonded Winery Number five (5), located at Lankershim, Sixth District of California;

Third That said plaintiff, Jacob Bauman, had given bond to the United States, conditioned that he would comply with all laws and regulations respecting the production, fortification etc., of all wines produced, and account for all brandy used in fortification;

Fourth That said winery premises thus bonded included within the boundary thereof, a room known and designated as a fortifying room;

Fifth That there were stored in said winery premises on November 15, 1920, eight hundred and twenty and nine-tenths (820.9) taxable gallons of grape brandy.

Sixth That said brandy was placed in said bonded winery premises under the supervision of the defendant herein, or his duly authorized representatives;

Seventh That the only door to said fortifying room was secured by a Government lock, attached thereto by a Government officer, by direction of the defendant herein;

Eighth That the key to said lock was kept in the possession of the Government officer at all times;

Ninth That sometime during the early hours of the evening of November 15, 1920, the said door to the fortifying room on the bonded winery premises of the plaintiff, was forced open by parties unknown to either defendant or plaintiff and the brandy stolen therefrom;

Tenth That subsequent to the theft of said brandy, the then Commissioner of Internal Revenue, assessed taxes against the plaintiff, the said Jacob Bauman, in the amount of \$1805.98, alleged to be the tax due on said brandy stolen from the fortifying room on the bonded winery premises of Winery number five (5), Lanker-

shim, of which the plaintiff was proprietor, to-wit: 820.9 taxable gallons at \$2.20 per gallon, \$1805.98.

Eleventh That notice and demand was made by defendant herein on the plaintiff for the payment of said tax in the amount of \$1805.98 that distraint was threatened by said defendant, and that the amount was paid to said defendant, John P. Carter, under protest by the plaintiff.

Twelfth That the fortifying room from which the brandy was stolen was a part of the bonded winery premises of Winery number five (5) Lankershim on November 15, 1920.

Thirteenth That the 820.9 gallons of untax paid brandy was the property of the plaintiff herein stored in said fortifying room on said November 15, 1920, and that the brandy lost by theft on said date was without the collusion, fraud or negligence of any kind on the part of said plaintiff; and that said plaintiff has not been reimbursed for the loss of this brandy and has no legal remedy against any person from which he can recover the loss of the said brandy;

Fourteenth That said fortifying room on the Winery premises of bonded Winery number five (5) Lankershim, was constructed in conformity with the law and regulations applicable thereto;

Fifteenth That said room was under the joint control of the defendant herein and the store-keeper gauger,

assigned by the defendant to take charge of said fortifying room.

Donald Armstrong,  
Assistant U. S. Attorney for Defendant.

Dan J. Chapin

Attorney for Plaintiff.

[Endorsed]: 1804 M. Jacob Bauman plaintiff, vs. John P. Carter, Collector, defendant. Stipulations. Filed February 2, 1926. Chas. N. Williams, clerk, by Louis J. Somers, deputy. Dan J. Chapin, attorney for plaintiff. Donald Armstrong, Asst. U. S. Atty, attorney for defendant.

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA.  
SOUTHERN DIVISION.

JACOB BAUMAN,	)	
	)	
	)	Plaintiff
	)	
	)	
Vs.	)	Law No. 1804-M
	)	
JOHN P. CARTER, Former Col-	)	
lector of Internal Revenue for the	)	
Sixth District of California.	)	
	)	
	)	Defendant.

FINDINGS AND JUDGMENT

August 16, 1926.

This cause came on to be heard at this time and upon consideration thereof the Court made findings and judgments as follows:

Findings of Facts

I.

That the allegations of the complaint are true and were sustained by the facts.

II

That there is no issue of fact to be decided as the litigants filed a written stipulation of the facts.

III

That the only question to be decided is whether the fortifying room of a bonded winery is a "distillery or other bonded ware-house", within the meaning of Section 5 of the Willis-Campbell Act, same being conceded by briefs of counsel.

IV.

That if the brandy was taxable, the proper amount of tax was assessed and paid, a claim for abatement and refund duly made and rejected by Commissioner of Internal Revenue and defendant Collector.

Conclusions of Law.

I

That the Court has jurisdiction of the parties of this suit and of the subject matter thereof.

II.

That the part of Section 5 of the Willis-Campbell Act applicable to the case is as follows:

“If distilled spirits upon which the internal revenue tax has not been paid are . . . . . lost by theft from a distillery or other bonded warehouse and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.”

### III.

That a fortifying room on the premises of a bonded winery is a bonded ware-house within the meaning of Section 5 of the Willis-Campbell Act and falls within the category of “other bonded ware-house” referred to in said Act.

### IV.

That plaintiff is entitled to recover from the defendant, John P. Carter, former Collector of Internal Revenue of the Sixth District of California, the sum of

\$1805.98 with interest from April 26, 1921 to August 16, 1926. Judgment to be entered accordingly, done this August 16, 1926.

Paul J. McCormick  
United States District Judge.

Approved as to form.

Ames Peterson  
Asst. U. S. Atty.

[Endorsed]: No. 1804-M. Law. U. S. District Court, Southern District of California, Southern Division. Jacob Bauman, plaintiff, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California, defendant. Findings and Judgment. Filed Aug. 24, 1926. Chas. N. Williams, clerk, by L. J. Cordes, deputy clerk. Dan J. Chapin, 513 I. W. Hellman, Los Angeles, Cal.

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UNITED STATES DISTRICT COURT SOUTH-  
ERN DISTRICT OF CALIFORNIA.  
SOUTHERN DIVISION.

JACOB BAUMAN, )  
 )  
 Plaintiff )  
 )  
 VS. ) No. 1804-M-Law.  
 )  
 JOHN P. CARTER, Former Col- )  
 lector of Internal Revenue for the )  
 Sixth District of California, )  
 )  
 Defendant. )

JUDGMENT

The issues in this action having been duly brought to trial before Honorable Paul McCormick, United

States District Judge, on August 16, 1926, and the Court having heard the allegations and proofs of the parties and after due deliberation having duly made its decision in writing in favor of the plaintiff and against the defendant with finding of fact and conclusions of law duly filed in the clerk's office of said Court.

Now, on said decision it is ordered, adjudged and decreed that the plaintiff, Jacob Bauman, recover of the defendant, John P. Carter, former Collector of Internal Revenue of the Sixth District of California, the sum of \$1805.98, with interest from April 26, 1921, to August 16, 1926. Judgment signed and entered this 25th day of August, 1926.

Chas. N. Williams,

CLERK.

[Endorsed]: United States District Court, Southern District of California Southern Division. Jacob Bauman, plaintiff vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California defendant. No. 1804 M- Law. Judgment. Filed Aug. 25, 1926. Chas. N. Williams, clerk, by L. J. Cordes, deputy clerk. Dan J. Chapin, 513 I. W. Hellman, Los Angeles, Cal.



IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN, )
Plaintiff, ) Law No. 1804-M
vs )
JOHN P. CARTER, Former Col- )
lector of Internal Revenue for the )
Sixth District of California, )
Defendant. )

.....
.....

Daniel J. Chapin, Los Angeles, California, for Plaintiff.
Samuel W. McNabb, United States Attorney, and
Donald Armstrong, Assistant United States Attorney,
of Los Angeles, California, for Defendant.

.....
.....

MEMORANDUM OPINION.

This is an action at law wherein plaintiff sues defend-
ant as Collector of Internal Revenue to recover \$1805.98
with interest from April 26, 1921. Plaintiff was re-
quired to pay said principal amount as taxes due on
820.9 proof gallons of grape brandy, assessed at the
rate of \$2.20 per gallon under Section 600 of an Act
approved February 24th, 1919 (40 Stat. 1057). The pay-
ment was made involuntarily and under protest and
solely to avert the imposed penalties provided in said

Act and to avoid distraint of Plaintiff's property which was threatened by defendant. A claim for abatement and refund was duly made by plaintiff on the ground that the taxes were illegally collected, and as to the principal amount sued for herein the claim was disallowed and rejected by the Commissioner of Internal Revenue and by defendant Collector. The claim to refund was made, and this action was brought under Section 5 of an Act supplemental to the National Prohibition Act, known as the Willis-Campbell Act, (42 Stat. 222), and the part of said Act applicable to this case is as follows:

"If distilled spirits upon which the internal revenue tax has not been paid are . . . . . lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act."

The litigants have filed a written stipulation of facts so that there is no issue of fact to be decided. It is

admitted that the brandy upon which the tax was assessed and collected was legally manufactured and lawfully deposited by plaintiff in a legitimate and authorized fortifying room on the premises of Bonded Winery No. 5 at Lankershim in the Sixth District of California. Plaintiff was the lawful proprietor of such bonded winery and premises as well as the lawful owner of such brandy. The brandy was securely placed and deposited in the fortifying room of the bonded winery premises on November 15th, 1920, and the only door to such fortifying room was securely locked by a regulation Government lock attached by an agent of the Government and by direction of defendant Collector, and the key to said door and fortifying room was kept by the Government officer at all times. Some time in the early hours of the evening of November 15th, 1920, after the fortifying room in which the brandy was deposited had been securely locked as aforesaid, the door thereof was forced open by parties unknown to either plaintiff or defendant, and the brandy deposited therein was stolen therefrom by parties unknown to either plaintiff or defendant. There is no intimation or contention that the theft and loss of the brandy was the result of negligence, connivance, collusion, or fraud of plaintiff in any manner. On the contrary, it is admitted that he was entirely innocent in the matter. No jurisdictional issue is raised by the parties.

The briefs of counsel concede that the only question for decision is whether the fortifying room of a bonded winery is a "distillery or other bonded warehouse"

within the meaning of Section 5 of the Willis-Campbell Act, (*supra*), and it is agreed that, if the brandy was taxable, the proper amount of tax was assessed and paid.

A fortifying room is an enclosed place on the premises of a bonded winery, designated and built under the supervision of the Commissioner of Internal Revenue and the Collector of Internal Revenue of the District in which such bonded winery is located for the deposit, storage, and use of brandy, when used to fortify wine, upon which the internal revenue tax has not been paid. The Government tax must be paid before the fortified wine leaves the fortifying room. Such a place is undoubtedly a "warehouse" according to common usage and meaning. Webster's New International Dictionary defines "warehouse" as "a storehouse for wares and goods; a receiving house." When broadly used, the term includes any structure used to store goods in. The term is specifically used respecting taxable and dutiable commodities when such are placed in the Government stores or bonded warehouses to be kept until the taxes or duties are paid.

The regulations of the Treasury Department further persuade one to the belief that fortifying rooms on bonded winery premises are regarded by the Government as store-rooms and warehouses. See Regulations 28, part I, Revision 1918, page 14, paragraph b. And an examination of the statutes relative to distillery warehouses (Section 3271, Revised Statutes) and a comparison with statutes authorizing, defining, and providing for the fortifying room in a bonded winery (Section 617, Act of February 24, 1919, 40 Stat. 1057) and also with

Sections 4 and 5 in Regulations 28, Part I, Revision 1918 of Treasury Department, clearly shows that the requirements, construction, control, and purposes of the fortifying room of a bonded winery are substantially the same as those of a distillery warehouse, and similar as well to the general and special bonded warehouses.

There is one paramount purpose and use common to all of such places, namely, that each of such places or depositaries are used for the storage of goods until the taxes are paid thereon. The mere fact that the brandy is mixed and intermingled with the wine in the fortifying room does not alter or destroy the storage or warehouse feature of such room. It is true that it is a place of manufacture but it is nevertheless a warehouse, because the wine and the brandy are stored therein before being mixed and intermingled, and the Treasury regulations expressly provide that the fortifying room is to be used as a warehouse or storeroom for all the brandy necessarily left over after fortification has taken place. There is no substantial difference, in so far as storage use is concerned, between distillery warehouses and fortifying rooms in bonded wineries. Section 24 of Regulations 28, Part I, Revision 1918, page 43, of the Treasury Department, furnish additional strong reasons to believe that the Internal Revenue branch of the Government considers the fortifying room as a bonded warehouse for the storage of brandy to be used in fortifying wine when it provides for the abatement of taxes when such brandy is lost through casualty while in the custody of the officers of the Internal Revenue, which is always

the case when the brandy is on lawful deposit in the fortifying room.

I have not been cited to any adjudication wherein the precise question for decision in this case has been considered, and an independent investigation has disclosed no applicable judicial precedent. The true test as to whether a warehouse is bonded appears to be as to whether the Government has taken control of the storehouse or warehouse and exercises dominion over the premises. See *United States vs. Powell*, 14 Wallace 493. The fortifying room of the bonded winery involved in this action, at the time the brandy was stolen and lost, was under the control of the government for the sole purpose of insuring, facilitating, and enforcing the payment of taxes due on the brandy that had been lawfully deposited therein under the supervision and direction of the Government. These facts and circumstances constitute such fortifying room nothing less or different than a bonded warehouse within the meaning of Section 5 of the Willis-Campbell Act, (*supra*). And, as has been already suggested, the fortifying room has all the essential marks of a distillery warehouse. But, assuming, without admitting, that there is a real distinction between a distillery warehouse referred to in Section 5 of the Willis-Campbell Act and the fortifying room of a bonded winery, nevertheless the fortifying room clearly falls within the category of "other bonded warehouse" referred to in said act.

I am unable to agree with the Government's contention that the only warehouses referred to in the Act in ques-

tion, under the phrase "other bonded warehouse," are the special and general warehouses provided for by the Act of March 3, 1877, as amended (19 Stat. 335), pages 251 and 252 of the Compilation of Internal Revenue Laws of 1920, and Sections 51 and 52 of the Act of August 27, 1894 (28 Stat. 509), for it would appear that Congress has provided that manufacture may be carried on upon the premises of a bonded warehouse and to a much greater extent than in a fortifying room and the place of manufacture still remain a warehouse. See Denatured Alcohol Act of June 7, 1906 (34 Stat. 1250); Bottle in Bond Act of March 3, 1897 (29 Stat. 626); and the Amendment to Section 3221, Revised Statutes, by Section 6, Act of March 1, 1879 (20 Stat. 327), applying to losses of spirits in cistern rooms of distilleries. All of these statutes provide for allowances of losses by casualty of spirits stored in these places in accordance with the provisions of Section 3221, Revised Statutes.

In the Statutes relating to the establishment of the various depositaries and places referred to in these Acts of Congress, the same precautions and requirements are found as exist in the laws establishing distillery warehouses or special or general bonded warehouses. The same general requirements as to construction, supervision, and control by the Government appears in all of these laws, just as it appears in the Statutes respecting the establishment and maintenance of fortifying rooms on bonded winery premises, and no reason is apparent to

me why a loss by casualty in a fortifying room should not have the benefit of the remedial provisions for the exemption from tax and penalty contained in Section 5 of the Willis-Campbell Act, (*supra*).

Findings and judgment for the amount sued for, together with interest, are ordered for plaintiff, and counsel for plaintiff will prepare same in accordance with the Rules of this Court.

Dated August 16th, 1926.

Paul J. McCormick,  
United States District Judge.

[Endorsed]: No. 1804-M. Law. U. S. District Court, Southern District of California, Southern Division. Jacob Bauman, plaintiff, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California, defendant. Memorandum Opinion. Filed August 16th, 1926. Chas. N. Williams, clerk by Louis J. Somers, deputy.



IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,	)	
	)	Law No. 1804-M
	)	
Plaintiff	)	
	)	
vs.	)	
	)	PETITION
JOHN P. CARTER, Former Col-	)	FOR WRIT OF
lector of Internal Revenue for the	)	ERROR.
Sixth District of California.	)	
	)	
	)	
Defendant.	)	
	)	

TO THE HONORABLE PAUL J. McCORMICK, Judge of said Court:

Now comes the defendant, John P. Carter, formerly United States Collector of Internal Revenue, Sixth District of California, by Samuel W. McNabb and Donald Armstrong, his attorneys, and feeling himself aggrieved by the final judgment of this court entered against him and in favor of Jacob Bauman, on the 25th day of August, 1926, hereby prays that a writ of error may be allowed to him from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court of the United States for the Southern District of California, and in connection with this petition, petitioner hereby presents his assignments of error.

Petitioner further prays that an order of supersedeas may be entered herein pending the final disposition of this cause.

SAMUEL W. McNABB,  
United States Attorney,  
Donald Armstrong,  
DONALD ARMSTRONG,  
Assistant United States Attorney.  
Attorneys for Defendant and  
Plaintiff in error.

[Endorsed]: No. 1804-M In the District Court of the United States for the Southern District of California Southern Division Jacob Bauman vs. John P. Carter, Former Collector of Internal Revenue for the Sixth District of California. Petition for Writ of Error. Filed Nov. 15, 1926 Chas. N. Williams, Clerk. By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN, )
)
Plaintiff and Defendant ) Law No. 1804-M
in Error, )
)
vs. )
) ASSIGNMENT
JOHN P. CARTER, Former Col- ) OF ERRORS.
lector of Internal Revenue for the )
Sixth District of California, )
Defendant, and Plaintiff )
in Error. )

Now comes the plaintiff in error by Samuel W. McNabb and Donald Armstrong, his attorneys, and in connection with his petition for a writ of error says that in the record, proceedings and in the final judgment aforesaid manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

I.

That the court erred in not entering judgment for the plaintiff in error herein upon the agreed statement of facts and upon the facts as found by the court in its findings of fact.

II.

That the conclusions of law as made by the court are not supported by the findings of fact.

III.

That the judgment as entered herein is contrary to law.

By reason whereof plaintiff in error prays that the judgment aforesaid may be reversed.

Dated: Los Angeles, California, this 15th day of November, 1926.

SAMUEL W. McNABB,  
United States Attorney.  
Donald Armstrong,  
DONALD ARMSTRONG  
Assistant United States Attorney.  
Attorneys for Plaintiff in Error.

We hereby certify that the foregoing assignment of errors is made in behalf of the plaintiff in error hereinabove named, for a writ of error and is in our opinion, and the same now constitutes the assignment of errors upon the writ prayed for.

SAMUEL W. McNABB,  
United States Attorney.  
Donald Armstrong,  
DONALD ARMSTRONG  
Assistant United States Attorney.  
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1804-M. In the District Court of the United States, for the Southern District of California, Southern Division. Jacob Bauman, vs. John P. Carter, former Collector of Internal Revenue for the Sixth District of California. Assignment of Error. Filed Nov. 15, 1926. Chas. N. Williams, clerk, by Edmund L. Smith, deputy clerk.

UNITED STATES OF AMERICA  
 District Court of the United States  
 SOUTHERN DISTRICT OF CALIFORNIA  
 Southern Division

Jacob Bauman  <div style="text-align: right;">Plaintiff,</div>	}	Clerk's Office
vs.	}	No. 1804 M
JOHN P. CARTER  <div style="text-align: right;">Defendant.</div>	}	Defendant and Plaintiff in Error's Praecipe for record

TO THE CLERK OF SAID COURT:

Sir:

Please prepare the following record on appeal in the above entitled case:

1. Copy of the Complaint filed in said case;
2. Copy of the Answer filed in said case.
3. Copy of the Stipulation of facts entered into by and between the parties in said case;
4. Findings of Fact found by the Court in said case;
5. Conclusions of Law in said case;
6. The Judgment of the court in said case;
7. Notice of Entry of Judgment in said case;
8. The Petition for Writ of Error in said case;

9. The Assignment in Error in said case;
10. The citation issued in said case.
11. The Writ of Error issued in said case.

Respectfully submitted

S. W. McNabb

U. S. Attorney

Donald Armstrong

Asst. U. S. Attorney

Attorneys for Def & Plf in Error

[Endorsed]: No. 1804 M. U. S. District Court Southern District of California Jacob Bauman plaintiff vs. John P. Carter defendant. Praeipce for Record on Appeal in above case. Received copy of the within praeipce this——day of January, 1927. Dan J. Chapin Attorneys for plaintiff and defendant in error. Filed Jan. 3, 1927 R. S. Zimmerman clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JACOB BAUMAN,	)	
	Plaintiff, )	
-vs-	)	
	)	
JOHN P. CARTER, Former Col-	)	CLERK'S
lector of Internal Revenue for the	)	
Sixth District of California,	)	CERTIFICATE.
	)	
Defendant. )		

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 32 pages, numbered from 1 to 32 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error and order allowing writ of error, bill of complaint, stipulation, findings and judgment, judgment, opinion, petition for writ of error, assignment of errors, and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to..... and that said amount has been paid me by the plaintiff in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this.....day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-seven and of our Independence the One Hundred and Fifty-first.

R. S. ZIMMERMAN,  
Clerk of the District Court of the  
United States of America, in  
and for the Southern District  
of California.

By

Deputy.



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IN THE  
United States  
Circuit Court of Appeals,  
FOR THE NINTH CIRCUIT.

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John P. Carter, Former Collector of  
Internal Revenue for the Sixth Dis-  
trict of California,

*Plaintiff in Error.*

*vs.*

Jacob Bauman,

*Defendant in Error.*

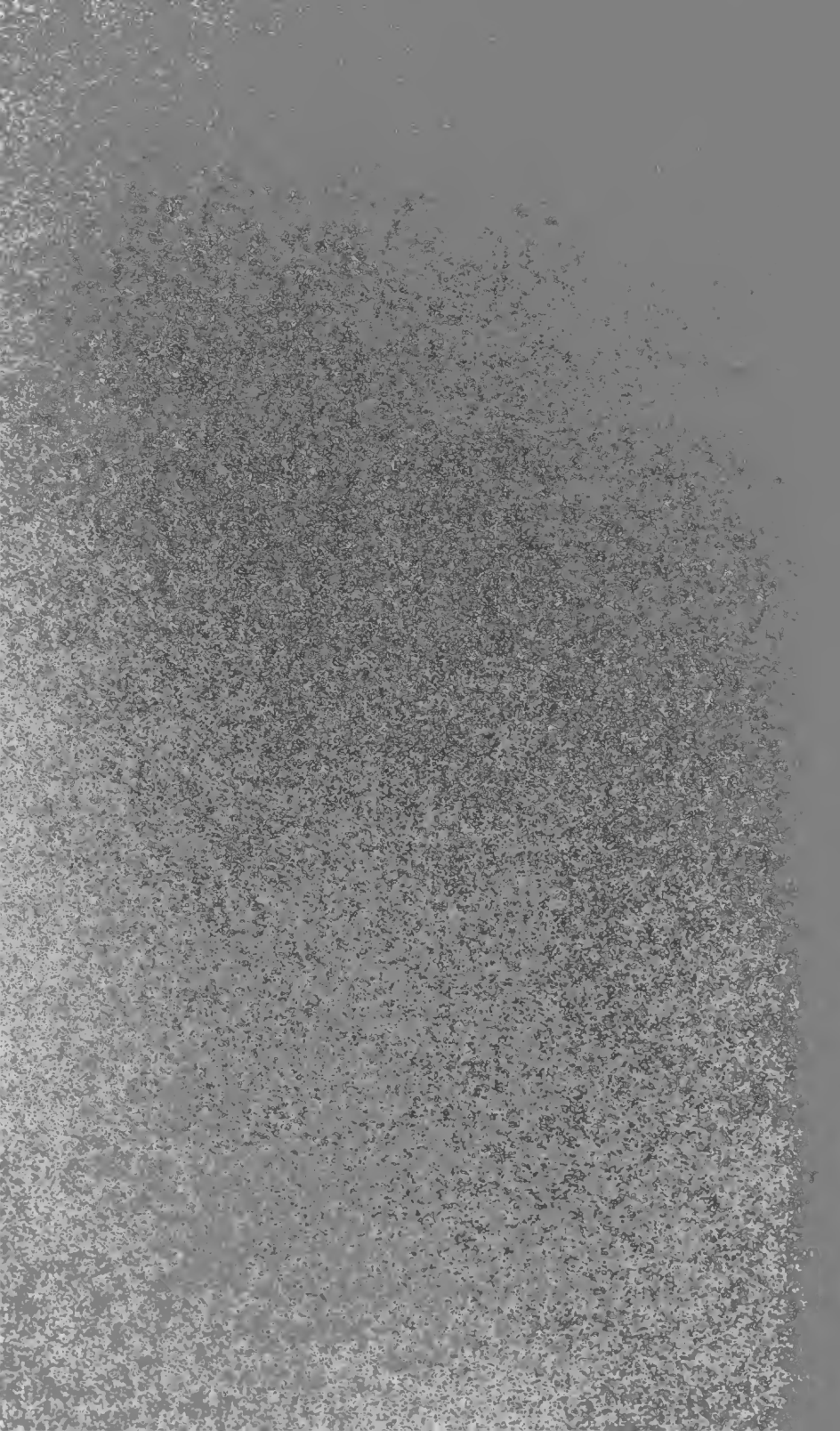
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OPENING BRIEF OF PLAINTIFF IN ERROR.

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SAMUEL W. McNABB,  
*United States Attorney,*

DONALD ARMSTRONG,  
*Assistant United States Attorney,*  
*Attorneys for Plaintiff in Error.*



No. 5098.

IN THE

United States

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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John P. Carter, Former Collector of  
Internal Revenue for the Sixth Dis-  
trict of California,

*Plaintiff in Error.*

*vs.*

Jacob Bauman,

*Plaintiff in Error.*

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## OPENING BRIEF OF PLAINTIFF IN ERROR.

This is an appeal from the judgment of the United States District Court for the Southern District of California in which the lower court allowed the recovery of the sum of \$1805.98, the amount of taxes assessed and collected by the plaintiff in error from the defendant in error upon 820.9 gallons of grape brandy which was stolen from the fortifying room of the bonded winery of defendant in error.

The facts are undisputed and are as follows:

That on the 15th day of November, 1920, and for sometime prior thereto, the defendant in error was the

owner and proprietor of Bonded Winery No. 5, within the Sixth Internal Revenue Collection District of California; that there was situated on these bonded premises a fortifying room in which the brandy in question was stored; that sometime during the evening of November 15th, 1920, the brandy was stolen from said fortifying room.

The only question presented to the court below and urged in this appeal is whether the fortifying room situated on premises constituting a bonded winery is a "distillery or other bonded warehouse" within the meaning of section 5 of an act supplemental to the National Prohibition Act, known as the Willis-Campbell Act (42 Stat. 222, Comp. St. Ann. Supp. 1923, Secs. 10138 4/5 (d) and 10138 4/5 (e)), which reads in part as follows:

"Distilled spirits upon which the internal revenue tax has not been paid are \* \* \* lost by theft from a distillery or other bonded warehouse, and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or penalties that may have occurred since the passage of the National Prohibition Act or that may occur hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provision of Title III of the National Prohibition Act."

It is the position of plaintiff in error that Congress did not intend to exempt the fortifying room of a bonded winery from payment of taxes upon the loss or theft of grape brandy therefrom by section 5 of the Willis-Campbell Act, *supra*, and that the words “distillery or other bonded warehouse” do not include the fortifying room of a bonded winery either within the meaning of said section or in ordinary or common parlance, and in support thereof respectfully submits the following:

Distillery warehouses are established under the provisions of section 3271, R. S., as amended, which section provides among other things that the warehouse shall be under the direction and control of the Collector of Internal Revenue of the Collection District in which it is situated and in charge of an Internal Revenue storekeeper assigned thereto by the Commissioner. Such bonded warehouse was held to be an agency of the Government in the case of *George v. Fourth National Bank of Lanesville* (41 Fed. 263). By virtue of 3251, R. S., as amended, the Government has an express lien on spirits in such warehouse,—on the buildings and land constituting the distillery premises.

That distillery warehouses are under the direction and control of the Collector of the District and in charge of an Internal Revenue storekeeper gauger assigned thereto by the Commissioner, see sections 3153, 3154, 3274, 3260 and 3293, R. S., as amended. In this connection attention is directed to the provisions pertaining to the establishment of distillery warehouses. A distiller must provide the warehouse at his own expense, which must be built in accordance with the provisions of section 3271, R. S., and Treasury Decision 2431. When thus constructed,

application must be made to the Commissioner of Internal Revenue for its establishment, and the application is required to be accompanied by a diagram of the warehouse and a certificate of examination by the Collector. The warehouse is then formally approved in writing by the Commissioner of Internal Revenue, the notice of approval containing a complete description of the warehouse, and storekeepers or storekeeper-gaugers must be assigned thereto by the Commissioner, formal notice being sent to the storekeeper or storekeeper-gauger and Collector, a record thereof being made in the office of the Commissioner.

Sections 51 and 52 of the Act of August 27, 1894 (28 Stat. 509) and pages 247 and 248 of the Compilation of Internal Revenue Laws of 1920 provide for the establishment of general bonded warehouses and contain much the same provision for the assignment of officers, placing the control of the warehouses in the Collector of Internal Revenue of the District and the joint custody of the storekeeper and the proprietor thereof.

The Act of March 3, 1877, as amended (19 Stat. 335, pages 251 and 252 of the Compilation of Internal Revenue Laws of 1920), provides for the establishment of special bonded warehouses for the storage of fruit, brandy. Section 1 thereof provides that each such warehouse shall be in charge of a storekeeper to be appointed, assigned, transferred, etc., in the same manner as storekeeper-gaugers at distillery warehouses, and further provides that every such warehouse shall be under the control of the Collector of Internal Revenue for the district in which located and shall be in the joint custody of the storekeeper and proprietor thereof.

The foregoing bonded warehouses are evidently the ones contemplated in section 5, Act of November 23, 1921, by the phrase "distillery or other bonded warehouse". It is only fair to assume that the Government by reason of the precautions in the establishment of and supervision over the foregoing warehouses intended to exempt the taxpayer from taxes on liquors lost at such warehouses.

The foregoing provisions of law and regulations pertaining to distillery and bonded warehouses do not, however, apply to the fortifying rooms of bonded wineries. Bonded wineries, including the fortifying rooms, are established and supervised in accordance with the provisions of sections 612 and 617 of the Revenue Act of 1918, approved February 24, 1919, section 612 reading in part as follows:

"That under such regulations and official supervision and upon the giving of such notices, entries, bonds, and other security as the Commissioner, with the approval of the Secretary, may prescribe, any producer of wines defined under the provisions of this title, may withdraw from any fruit distillery or special bonded warehouse grape brandy, or wine spirits, for the fortification of such wines on the premises where actually made \* \* \*."

Section 617, amending sections 42, 43 and 45 of the Act of October 1, 1890, as amended, reads in part as follows:

"That any producer of pure sweet wines may use in the preparation of sweet wines, under such regulations and after the filing of such notices and bonds, together with the keeping of such records and the rendition of such reports as to materials and prod-

ucts as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, wine spirits produced by any duly authorized distiller \* \* \*.”

Section 4, subdivision (b) of regulation 28, part I of the Commissioner of Internal Revenue, drawn and adopted pursuant to sections 612 and 617 of the Revenue Act of 1918 and approved by the Secretary of the Treasury, reads as follows:

“A winery, where wine is to be fortified, in all cases will consist of a room to be known as the fortifying room.”

Section 17 of said regulations reads in part as follows:

“When a winemaker desires to begin the fortification of sweet wines, he will make a request for the assignment of an officer to supervise the fortification of such wine.”

The fortifying room, although part of the bonded premises and thus “bonded” is not a warehouse as that term is used either in the revenue laws or regulations or in common parlance. A fortifying room is used principally as an incident to the manufacture of wine and not for the storage of distilled spirits as the brandy or distilled spirits are withdrawn from a distillery or bonded warehouse as is evidenced by sections 612 and 617 of the Revenue Act of 1918. Spirits may be kept on hand or stored in this room but such a use occurs after the spirits have been taken out of the warehouse where the loss occurring would be allowable and is held pending its use in the manufacture of sweet wines. It is thus substantially a manufacturing use and does not convert a manufacturing plant into a warehouse. A distillery or other



bonded warehouse is strictly one defined by statute as has been heretofore shown, while the fortifying room of a bonded winery is created and supervised by regulation of the Commissioner of Internal Revenue.

It is, therefore, respectfully urged that Congress did not intend to include the fortifying room of a bonded winery within the meaning of section 5 of the Willis-Campbell Act, *supra*, and that the judgment of the lower court should be reversed and judgment entered for the plaintiff in error.

Respectfully submitted,

SAMUEL W. MCNABB,

*United States Attorney,*

DONALD ARMSTRONG,

*Assistant United States Attorney,*

*Attorneys for Plaintiff in Error.*



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IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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John P. Carter, former Collector of Internal Revenue for the Sixth District of California,

*Plaintiff in Error.*

*vs.*

Jacob Bauman,

*Defendant in Error.*

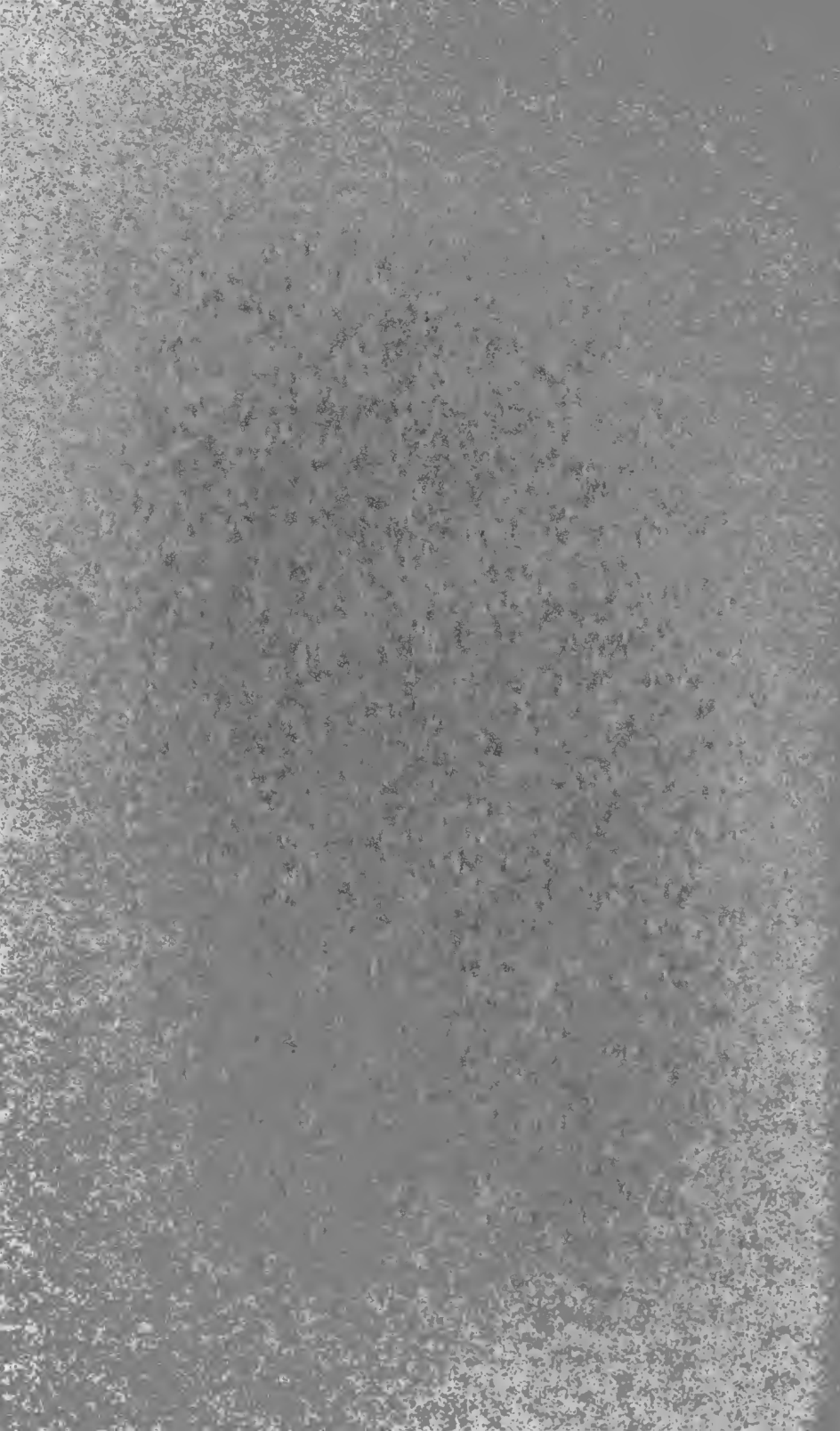
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BRIEF FOR DEFENDANT IN ERROR.

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DAN J. CHAPIN,

*Attorney for Defendant in Error.*



No. 5098.

IN THE

United States

# Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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John P. Carter, former Collector of Internal Revenue for the Sixth District of California,

*Plaintiff in Error.*

*vs.*

Jacob Bauman,

*Defendant in Error.*

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BRIEF FOR DEFENDANT IN ERROR.

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## STATEMENT OF THE CASE.

Jacob Bauman, the defendant in error, is a resident of the city and county of Los Angeles, California, and was on the 15th day of November, 1920, the proprietor of Bonded Winery No. Five, Lankershim, that the defendant in error had given to the United States a bond covering the premises occupied by said winery, conditioned that he would comply with all the laws and regulations respecting the production and fortification of all wines produced and account for all brandy used in fortification of wines

manufactured on the winery premises, that said winery premises, thus bonded, included within the boundaries thereof, a room known and designated as a fortifying room, that on the afternoon of the 15th day of November, 1920, Jacob Bauman deposited 890.9 proof gallons of grape brandy in the fortifying room under the supervision of an officer of internal revenue, designated by the plaintiff in error; that the officer secured the only door leading into the fortifying room by a government lock, keeping the key thereto in his possession, that sometime during the early hours of the evening of November 15, 1920, the door, aforesaid, was forced open by some one unknown to either the plaintiff or defendant in error and the entire 890.9 gallons of brandy, so deposited, therein was stolen therefrom. After the brandy was so stolen, Jacob Bauman paid under protest a stamp tax of \$1805.98 on the 820.9 proof gallons of brandy stolen at the rate of \$2.20 per proof gallon. Accordingly the present action was instituted against plaintiff in error, former Collector of Internal Revenue, to recover the tax thus paid under protest. Judgment passed in the District Court in favor of defendant in error for the return of the amount sought to be recovered in accordance with the complaint, and the present appeal results therefrom.

Prior to November 23, 1921, there was no provision of law that relieved the proprietors of distillery warehouse or other bonded warehouse from the tax on distilled spirits stored therein, lost by theft. Congress on the date aforesaid, passed an act entitled "An Act supplemental to the National Prohibition Act," known as the Willis-Campbell Act (42 Stat. 222) which relieved the proprietors from the tax on distilled spirits so lost from aforesaid ware-

houses provided, the loss was not caused by the negligence, connivance, collusion or fraud on part of the owner or proprietors thereof. Section five (5) of said act in part is as follows:

“If distilled spirits upon which the internal revenue tax has not been paid are \* \* \* lost by theft from a distillery or other bonded warehouse and it shall be made to appear to the commissioner that such losses did not occur as the result of negligence, connivance, collusion or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claims for taxes or tax penalties that may have accrued since the passage of the National Prohibition Act or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Title III of the National Prohibition Act.”

The sole question involved here is whether a room on the premises of a bonded winery, known as the fortifying room, is a “distillery or other bonded warehouse” within the meaning of section 5 of the Willis-Campbell Act (*supra.*) The determination thereof hinges on whether or not a fortifying room on the premises of a bonded winery premises is a bonded warehouse, as defined by the statutes providing for such warehouses.

It is the contention of the defendant in error:

(1) That a fortifying room on the bonded premises of a winery is a bonded warehouse.

(2) That there has been no decision of the Federal Courts passing upon the precise question involved in the appeal. Such being the case, the question is resolved into a comparison of the laws and regulations constituting distillery warehouses and such other bonded warehouses as the statutes have provided for and fortifying rooms on bonded winery premises and if the requirements, authority and control are the same as to all, then it must follow that a fortifying room is a bonded warehouse.

(3) That distilled spirits stored in a fortifying room, loss by theft is not subject to any tax thereon.

(4) That where the government exercises a control and dominion over a warehouse that is superior to the owner, it cannot be a free warehouse and if it is bonded, then it must be a bonded warehouse.

### **Statutes Involved, Primarily.**

Section 5 of an Act Supplemental to National Prohibition Act (42 Statute 222) *supra*.

### **Secondarily (For Comparison).**

Regulations Series Number 7, pages 30, 31 and 34;  
Section 51, Revised Statutes, Act of August 27,  
1874 (28 Stat. 509);

Section 1, Revised Statutes, Act of March 3, 1877  
(19 Stat. 393);

Section 45, Revised Statutes (26 Stat. 621);

Regulations Number 28, part 1, Revised 1918, page  
13, paragraphs 4 and 5;

Sections 3271, 3273 and 3274, Revised Statutes.

The pertinent provisions of the above sections are set out further along in this brief.



## Facts.

The facts have been stipulated, record of transcript pages 11 to 14 inclusive, so no issue of fact is involved before this court.

## ARGUMENT.

### I.

#### A Fortifying Room on the Premises of a Bonded Winery Is a Bonded Warehouse.

In order to sustain the position above stated, two elementary propositions must be settled.

(1) That the room in question is a warehouse.

(2) That the premises of which it is a part, is bonded.

A warehouse is defined by Webster's Unabridged Dictionary as follows: generally, "A storehouse for wares and goods, a receiving house," specifically, "To deposit or secure in a government or bonded warehouse until duties are paid."

A warehouse was considered in 23 Maine 47, the court saying:

"A warehouse is a place used for the reception of goods and merchandise."

The government regulation prescribing the requirements of a fortifying room make of it a warehouse as defined above (Regulations No. 28, Part I, pages 13 and 14 *supra*.)

#### Paragraph Five.

(a) "This room will be locked with government seal lock, the key of which at all times, when brandy, sweetening agents or wines for refortification are on deposit therein.

(b) "The fortifying room must be sufficiently large to admit storage of all brandy withdrawn for fortification purposes that may be on hand unused at any one time. \* \* \* All tanks within the fortifying room must be designated as fortifying tanks.

(c) "\* \* \* The office must be furnished with chair, a desk, with one or more drawers \* \* \* and of a capacity enough for keeping blanks, forms, rough drafts of form 275 daily reports of fortification \* \* \*"

That the fortifying room in question was used for the purpose of storing goods and merchandise and further that on the goods and merchandise stored therein the duties had not been paid, the transcript, page 12, paragraph 4, 5 and 6 discloses that 890.9 gallons of grape brandy was stored and deposited therein. It is, therefore, submitted that a fortifying room is a warehouse.

It is admitted by paragraphs 3 and 4, page 12 of the transcript, that the fortifying room in question was bonded, therefore, it is contended the determination of propositions one to four above is that the fortifying room on the premises of a bonded winery is a bonded warehouse.

This contention is further sustained by court decisions as follows:

In the George case, 41 Fed. 257, the court says:

"That a bonded warehouse is one which the Government holds and maintains control of the security of its contents superior to that of the owner to such extent that he can only have admittance thereto at the sufferance of the Government officer, that such a bonded warehouse can in no sense be construed as a free warehouse."

Justice Hughes passing on the control of warehouses held:

“The control of the Government’s representatives is made dominant as in the nature of the case it must be in order to fulfill the purpose of the act.”

232 U. S. Reports 174.

These expressions of the court show that the Government’s control over bonded warehouses and that where such is the case that the warehouse is bonded, otherwise, it would be a free warehouse.

A fortifying room on the premises of a bonded winery in view of these decisions must be classed as a bonded warehouse as its contents are absolutely under the control of the Government’s representatives to the exclusion of the proprietor. It being such a warehouse, there can be no tax asserted on spirits or brandy lost therefrom by theft.

**Are the Requirements Relative to Construction, Control and Dominion Over a Fortifying Room Comparatively the Same as the Statutes and Regulations Prescribed for a Distillery or Other Bonded Warehouse, as Other Bonded Warehouses Have Been Specifically Designated by the Statutes and Regulations.**

In making the comparison, the provisions relative to distillery warehouses have been used, as no provisions of law are made regarding construction of general and special bonded warehouses.

Sections 3271 and 3274, Section 617, Act of February 24, 1919, 40 Stat. Revised Statutes, provided

as to distillery warehouse as follows:

Distiller must provide a warehouse at his own expense. Must be part of distillery premises, can be used only for storage of spirits of his own manufacture until tax thereon has been paid.

No door, window or other opening shall be made or permitted in the wall of such warehouse leading into the distillery or any other room or building.

Plan of distillery warehouse must be approved by the Commissioner of Internal Revenue.

Distillery warehouse shall be under the direction and control of the collector of the district and in charge of an internal revenue store-keeper gauger, assigned thereto by the commissioner.

1057), and regulations promulgated thereunder, provide as to fortifying rooms (Reg. 28, Part 1, paragraph 4 and 5) *supra*, as follows:

Wine maker must provide fortifying room, must be part of the bonded winery premises, can be used for storage of brandy either his own make or secured from another distillery and allowed to remain until tax is paid on wine after fortification.

The room must be securely built and partitioned as to be entirely separate from every other part of the winery. With all the doors, windows or other openings leading to or from the room so arranged and built that the same may be securely locked, bolted or barred from the inside.

Plan of fortifying room must be approved by the Commissioner of Internal Revenue.

The fortifying room when brandy is stored therein shall at all times be under the supervision and in the custody of an officer of internal revenue.

Every distillery warehouse shall be in joint custody of the government officer and the proprietor and be kept securely locked and the key in possession of the government officer and can be opened only in presence of the officer, and no articles can be received or delivered therefrom except on order or permit addressed to the storekeeper and signed by collector having control of the warehouse.

Every distillery must give a bond covering the tax on the spirits to be deposited in the distillery warehouse, conditioned that any tax against said spirits may be recovered from the bond.

It will be noted that the requirements as to construction and control are essentially the same relative to distillery warehouse and a fortifying room. The statutory and regulatory requirements regarding construction and control of industrial alcohol bonded warehouses are in substance in conformity with those affecting distillery ware-

All doors to the fortifying room must be locked from the inside except the entrance door, which will be locked with Government seal lock, the key of which will at all times when brandy or wines are deposited therein, be in the custody of the officer in charge. Collectors will make requisitions for the necessary locks and seals, the same to be supplied, used and accounted for as in case of distillery warehouse. The owner can only enter the fortifying room by permission of the revenue officer in charge.

Every wine maker must give bond sufficient in amount to cover the tax on the brandy he intends to store in his fortifying room and for any assessments of deficiency found and conditioned that all such taxes or deficiency assessed may be collected under the bond.

houses and fortifying rooms. As provided by Regulations 61, approved July, 1920, page 32, article 36 and page 38, article 46.

General bonded warehouses are provided for by section 51, act of August 27, 1894 (28 Stat. 509) as follows:

“Every such warehouse shall be under the control of the collector of internal revenue of the district in which such warehouse is located, and shall be in joint custody of the storekeeper and proprietor thereof, and kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper or other person who may be designated to act for him, as provided in the case of distillery warehouse.”

Special bonded warehouses are provided for by section one (1) Act of March 3, 1877 (19 Stat. 393) although passed at an earlier date, the same identical language is used relative to their control as regards general bonded warehouses, *supra*.

In addition to the requirements and control of a fortifying room conforming to those surrounding a distillery warehouse, the same restrictions are thrown around the fortifying room as are provided for industrial alcohol bonded warehouse general and special bonded warehouse.

It therefore appears conclusive that the same requirements and control are now provided for a fortifying room as are provided for all other bonded warehouses mentioned in the statutes. If its uses and purposes are the same, it must follow that it is a bonded warehouse, and that the loss of spirits therefrom by theft is not subject to tax.

There can be only one use and purpose for a bonded fortifying room on the premises of a bonded winery, and

that is to secure the payment of the tax due on the brandy and wine stored therein, else it would be wholly unnecessary to require the bond.

It is submitted that the law, regulations and facts sustain the defendant in error in his contentions, *supra*.

## II.

**Is a Fortifying Room Situated on Premises of a Bonded Winery "A Distillery or Other Bonded Warehouse" Within the Meaning of Willis-Campbell Act *Supra*?**

It has been held in *United States v. Isham* (17 Wall 496) that

"The words of statute are to be taken in the sense in which they will be understood by the public in which they are to take effect. Science and skill are not required in their interpretation, except when scientific and technical terms are used. The liability of an instrument to stamp duty, as well as the amount of such duty is determined by the form and face of the instrument, and can not be affected by proof of facts outside of the instrument itself."

Applying this decision to the meaning of the statutes and regulations involved, it must follow that a fortifying room is one of the other bonded warehouses, designated in the Willis-Campbell Act *supra*. Its uses and purposes are the same as all other uses and purposes of other bonded warehouses, there can be only one use in fact of a bonded warehouse, and that is to secure the payment of the revenues on the objects and goods stored therein. If revenues were paid previous to time the tax paid articles were deposited therein, it would be of no conse-

quence to the Government what was carried on in the warehouse, manufacturing or what not.

The learned trial judge has so clearly and cogently presented this phase of the matter that we shall quote his written opinion [pp. 23 and 24 of transcript]:

“There is one paramount purpose and use common to all such places, namely, that each of such places or depositaries are used for the storage of goods until the taxes are paid thereon. The mere fact that the brandy is mixed and intermingled with the wine in the fortifying room does not alter or destroy the storage or warehouse feature of such a room. It is true it is a place of manufacture, but it is nevertheless a warehouse, because the wine and the brandy are stored therein before being mixed and intermingled the treasury regulations expressly provide that the fortifying room is to be used as a warehouse, or store-room for all brandy necessarily left over after rectification has taken place.

There is no substantial difference in so far as storage use is concerned, between distillery warehouses and fortifying rooms in bonded wineries. Section 24 of Regulations 28, part 1, Revision 1918, page 43 of the Treasury Department furnishes additional strong reasons to believe that the Internal Revenue Branch of the Government considers the fortifying room as a bonded warehouse for the storage of brandy to be used in fortifying wine when it provides for abatement of taxes when such brandy is lost through casualty while in custody of the officers of the Internal Revenue, which is always the case when the brandy is on lawful deposit in the fortifying room.”

The plaintiff in error in his brief takes the position that a fortifying room is not included as a distillery warehouse or other bonded warehouse (p. 8 of brief).



(1) It is not a warehouse as that term is used in revenue laws or regulations or in common parlance.

(2) It is used principally as an incident to the manufacture of wine and not for the storage of distilled spirits. \* \* \*

On the first proposition the courts have established that any place where goods are stored or received for deposit is a warehouse or storage house and that common usage has established the terms as synonymous.

In *Ray v. Com.*, 12 Bush Ky. 397, the court held that granary for keeping and preserving farm utensils is a warehouse.

In *Hunter v. Com.*, 48 S. W. Rep. 1077, it was held that an opera house used for storage and safe keeping of stage properties between occasions when it is used for entertainments, is a warehouse.

Adjudication of the matter of a warehouse establishes that such a room as a fortifying room would, as used in common parlance, be classed as a warehouse and nothing less.

The internal revenue laws have firmly fixed the status of a fortifying room as a storage place.

Section 45, Revised Statutes (26 Stat. 621) provides:

“No wines or spirits other than those permitted by this regulation shall be stored in any room or part of the building in which fortification of wines is practiced.”

Regulations 28, part 1, *supra*, provides:

“The fortifying room must be sufficiently large to admit of the storage of all brandy withdrawn for fortification purposes that may be on hand unused at any one time.”

The second proposition *supra* is likewise not sustained by the law and regulations relative to bonded warehouses.

Congress has, by statute, provided that manufacturing may be carried on upon the premises of a bonded warehouse and to a much greater extent than in a fortifying room and it still remains a bonded warehouse. As clearly appears by the provisions of the Denatured Alcohol Act of June 7, 1906 (34 Stat. 1250) Title III National Prohibition Act (41 Stat. 305), Bottle in Bond Act of March 3, 1897 (29 Stat. 626). Amendment to Section 3221, Revised Statutes (20 Stat. 327). All of said acts provide for allowances of losses of spirits stored in these bonded warehouses under Section 3221 Revised Statutes and each are consequently classed as one of the other bonded warehouses within the meaning of the section and that manufacturing is carried on therein makes them no less a bonded warehouse.

The position of the trial judge is, therefore, more firmly fortified and the contentions of the plaintiff in error cannot prevail.

The plaintiff in error concludes on page 7 of his brief that special and general bonded warehouses are the ones contemplated by section 5, Act of November 23, 1921, by the phrase "distillery or other bonded warehouse," giving as his reasons therefore the precautions in establishment and supervision.

We have shown that the precaution in establishment and supervision is no greater over these warehouses than over a fortifying room, but again reference to the statutes discloses that Congress did not have in mind special and general bonded warehouses as the only other bonded warehouse.

In the year 1872, Section 3221, Revised Statutes, was passed as a part of the Act of June 6, 1872 (17 Stat. 238) which provided among other things as follows:

“The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty and without any fraud, collusion or negligence of the owner, thereof of any distilled spirits while the same remain in the custody of any officer of internal revenue in any distillery or bonded warehouse of the United States and before the tax thereon has been paid may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bonds or enter satisfaction thereon, in whole or in part as the case may be.”

The remainder of the section is the amendment of 1879. It will be noted that the exact language, distillery or bonded warehouse, is used in this early act as appears in the Willis-Campbell Act *supra*. It will be further noted that this section does not provide for loss of spirits by theft.

In the year 1877, the Act of March 3, 1877 (19 Stat. 393) which provided for establishing special bonded warehouses, the provisions of section 3221 were extended to special bonded warehouse as follows:

“And the provisions of existing law relative to an allowance of loss by casualty in a distillery bonded warehouse are hereby made applicable to brandy stored in special bonded warehouses in accordance with provisions of this act.”

In the year 1894 the act providing for general bonded warehouses was passed and again the provisions of section 3221 *supra* were extended to such warehouses as follows:

“\* \* \* Including the provisions for allowance for loss by accidental fire or other unavoidable accident are hereby extended and made applicable to spirits deposited in general bonded warehouses under this act.”

In the year 1906 the Act of June 7, 1906 (34 Stat. 215) page 344, the provisions of section 3221 *supra*, was “extended and made applicable to the loss of grape brandy withdrawn for use in the fortification of sweet wines and which prior to such use is accidentally destroyed by fire or other casualty while stored in the fortifying room on the winery premises.”

Therefore, if Congress had in mind that special and general bonded warehouse were the only one to be included in the phrase “other bonded warehouse” it would have been wholly unnecessary to extend the provisions of section 3221 to apply to them for the phrases in both acts are identical, but if plaintiff in error should be correct in his reasoning, it has been shown that Congress classed a fortifying room on a par with general and special bonded warehouse by extending in 1906 the provisions of section 3221 to fortifying rooms.

It is not conceded that plaintiff in error is correct in his conclusions, the explanation in our opinion of the provisions in the early act 1872, is that at that time the only bonded warehouses in existence were the distillery warehouse and the distillery bonded warehouse, that is, when the spirits were drawn into the barrels from the tanks, commonly known as the cistern room, which was the room designated as the distillery warehouse, and after the barrels were taken from the cistern room to another part of the distillery for storage and ageing and to be kept until

withdrawn and tax paid; this room was known as and called the bonded warehouse, at that early date other warehouses were not provided for or needed.

It is not clear why the provisions of section 3221 were extended to general special bonded warehouses and to bonded fortifying rooms only in view of the position stated that in 1872 there were no such warehouses and consequently in an excess of precaution, the provisions were so extended, however, at this date various characters of bonded warehouses have been established and all such warehouses that are bonded to the United States are known as bonded warehouses.

### In Conclusion.

In final confirmance of the decision of the trial court, it is submitted that the room in question is no less a bonded warehouse by being designated a fortifying room.

The true test the trial court said [p. 24 of transcript]

“as to whether a warehouse is bonded appears to be as to whether the Government has taken control of the store house or warehouse and exercise dominion over the premises.”

Citing *United States v. Powell*, 14 Wallace 493.

The question was raised in this case that a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution and is almost identical with the plaintiff's in error contention, the court said:

“Attempt is made to show a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution, but the proposition cannot be maintained as the Act of Congress provides that such a warehouse when approved by the commissioner on report of the collector shall be deemed a bonded

warehouse of the United States and it matters not that the act provides that it shall be known as a distillery warehouse as the requirements of the act are that it shall be under the direction and in the charge of an internal revenue storekeeper assigned thereto by the commissioner, beyond all doubt therefore the internal bonded warehouse referred to in the joint resolution includes the bonded distillery warehouse known as the distillery warehouse described in section 15 of the act imposing taxes on distilled spirits.”

It would appear that this decision makes certain the opinion of the trial court and sustains defendant in error in his contention that a fortifying room of a bonded winery is a bonded warehouse, as it is under all the control by the Government that is placed over a distillery or other bonded warehouse, and the fact that it is known as a fortifying room would not exclude it from being a bonded warehouse and that it thereby falls within the classification of “other bonded warehouses” referred to in the Willis-Campbell Act, *supra*.

Respectfully submitted,

DAN J. CHAPIN,  
*Attorney for Defendant in Error.* 51









